TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 154.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES FOR THE USE AND BENEFIT OF STRUTHER WELLS COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED NOVEMBER 17, 1906.

(20,459.)

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a United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error (Defendant Below),
vs.
THE UNITED STATES, for the Use and Benefit of STRUTHERS WELLS COMPANY, Defendant in Error (Plaintiff Below).

Transcript of Record.

Error to the Circuit Court of the United States for the Eastern District of New York.

Printed under the Direction of the Clerk.

1 United States Circuit Court for the Eastern District of New York.

THE UNITED STATES, for the Use and Benefit of STRUTHERS WELLS COMPANY, Plaintiff,
against
UNITED STATES FIDELITY AND GUARANTY COMPANY, WILLIAM H. FLAHERTY, and FREDERICK M. LANDE, Defendants.

To the above named Defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to file your answer and serve a copy thereof on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice
2 of the United States, at the Borough of Brooklyn, this 12th day of April, in the year one thousand nine hundred and five.

[L. S.] B. LINCOLN BENEDICT, *Clerk.*

HEYN & COVINGTON,
Plaintiff's Attorneys.

Office and Post Office address, 135 Broadway, Borough of Manhattan, New York City, New York.

(Endorsed:) United States Circuit Court, Eastern District of New York.—United States for the use and benefit of Struthers Wells Company *vs.* United States Fidelity and Guaranty Co. *et als.*—Summons.—Heyn & Covington, Plaintiff's Attorneys.—Filed April 19, 1905.

United States of America, Eastern District of New York, ss—I hereby certify, that on the 12th day of April, 1905, at 44 Court St., I personally served the within summons on the within named defendant U. S. Fidelity & Guaranty Co., Jas. Fawkner, Agt., by showing him the same and delivering to and leaving with him a true copy thereof.—Chas. J. Haubert, U. S. Marshal, By W. H. Caldwell, Deputy.

3 United States Circuit Court, Eastern District of New York.

UNITED STATES (for the Use and Benefit of STRUTHERS WELLS COMPANY), Plaintiff,

against

UNITED STATES FIDELITY AND GUARANTY COMPANY, WILLIAM H. FLAHERTY, and FREDERICK M. LANDE, Defendants.

Struthers Wells Company brings this action in the name of the United States for its use and benefit against the defendants, pursuant to the Act of Congress of August 13, 1894, and complaining against the defendants, alleges, on information and belief:

First. That said Struthers Wells Company, during all the times hereinafter mentioned, was and now is a corporation organized and existing under the laws of the State of Pennsylvania.

Second. That the defendant, the United States Fidelity and Guaranty Company, during all the times hereinafter mentioned, was and now is a corporation organized and existing under the laws of the State of Maryland, and has one of its principal places of business in the City, County and State of New York, Borough of Manhattan, at No. 66 Liberty Street, and also has one of its principal places of business and an office for the transaction of its business at No. 44 Court street, Borough of Brooklyn, County of Kings, State of
4 New York, in said district.

Third. That on or about the 10th day of December, 1903, a formal contract in writing was duly made and entered into between the United States and the defendant William H. Flaherty, of the Borough of Brooklyn, County of Kings, State of New York (the United States being represented by Colonel W. A. Jones, U. S. A., Engineer, 5th Light House District), for the construction by said William H. Flaherty of a certain lighthouse at Baltimore, Maryland, for the terms and provisions of which said contract the said Struthers Wells Company begs leave to refer to the duly certified copy of said contract applied for by the said Struthers Wells Company and furnished them by the Hon. Secretary of Commerce and Labor of the United States (pursuant to the act of Congress approved August 13th, 1894, entitled "An Act for the protection of persons furnishing materials and Labor for the Construction of Public Works"), and said Struthers Wells Company will upon the trial of this action produce said certified copy in Court.

Fourth. That said Struthers Wells Company further alleges that at the time of entering into the aforesaid contract with the United

States and on the 10th day of December, 1903, the defendant William H. Flaherty as principal and the defendant the United States Fidelity and Guaranty Company as surety duly executed and delivered pursuant to the said act of Congress approved August 13, 1894, a bond of which said Struthers Wells Company pursuant to said act, duly applied for and obtained a certified copy, which copy said Struthers Wells Company begs leave to and will produce upon the trial of this action, a copy of which is hereto annexed marked "Exhibit A," and that said bond contains the condition that the defendant William H. Flaherty, his successors, heirs, ex-
5 ecutors or administrators, shall well and truly execute the contract according to all the conditions thereof, and shall promptly make payments to all persons supplying him with material and labor in the prosecution of the work provided for in said contract.

Fifth. That said William H. Flaherty at the time of the execution of said bond, and at the time of the making of the said contract, resided, and still resides, in said Borough of Brooklyn, County of Kings, City of New York, in the Eastern District of New York.

Sixth. That after the execution of said contract said defendant William H. Flaherty associated with himself as copartner the defendant Frederick M. Lande under the firm name of Flaherty & Lande to perform and carry out said contract with the United States.

Seventh. That in or about the month of March, 1904, the said Struthers Wells Company agreed with said defendants William H. Flaherty and Frederick M. Lande to supply, furnish and deliver to the defendants, at their special instance and request, certain labor and material, viz.:

4 sections of riveted steel shafting, six feet in diameter, at the agreed price and reasonable value of $763; 4 sections of riveted steel shafting, five feet in diameter, at the agreed price and reasonable value of $605.50; material for cutting edge for caisson, 48 feet square, at the agreed price and reasonable value of $549.50; making alteration in the four sections of steel shafting, six feet in diameter, at the agreed price and reasonable value of $105, making a total of $2,023, upon which freight was to be allowed, amounting to $132.75, leaving a balance of $1,890.25.

6 That said labor and material aforesaid was so to be supplied, furnished and delivered by said Struthers Wells Company for use in the prosecution and completion of the work provided for in said contract with the United States hereinbefore mentioned, and the said Struthers Wells Company did, in or about the month of April, 1904, supply, furnish and deliver the said labor and material, and the same was used, supplied, furnished and delivered in the prosecution and completion of the said work provided for in the aforesaid contract with the United States, and the said Struthers Wells Company duly performed all the conditions on its part to be performed and as agreed by it to be performed for the furnishing of said labor and material.

Eighth. That by reason of the premises there became due to Struthers Wells Company from the defendants the sum of one thou-

sand eight hundred and ninety dollars and twenty-five cents ($1,890.25) with interest from June 7, 1904, of which said sum or interest no part has been paid, though duly demanded.

Wherefore, plaintiff demands judgment against the defendants for the sum of one thousand eight hundred and ninety dollars and twenty-five cents ($1,890.25) with interest from the 7th day of June, 1904, besides the costs and disbursements of this action.

HEYN & COVINGTON,
Attorneys for Plaintiffs.

Office and Post Office address, No. 135 Broadway, New York City, Borough of Manhattan.

7 EXHIBIT "A."

Know all men by these presents That we, William H. Flaherty of the City of Brooklyn, N. Y. as principal, and The United States Fidelity and Guaranty Co., a corporation created and existing under the laws of the State of Maryland of Baltimore, Md., as surety, are held and firmly bound unto the United States of America in the sum of Forty thousand dollars ($40,000) lawful money of the United States, to be paid to the said United States, or its authorized agent, as liquidated damages; for which payment, well and truly to be made, we, and each of us, do bind ourselves and each of our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, dated this 10th day of December, one thousand nine hundred and three.

The condition of the above obligation is such, that if the said William H. Flaherty, his successors, heirs, executors or administrators, shall well and truly execute the contract hereto annexed, which he has entered into with Colonel W. A. Jones, U. S. A. Engineer, of the Fifth Lighthouse District, for and in behalf of the United States, by which he covenant and agree to completely construct and deliver the Metal Work for the Baltimore Light-House, Maryland, according to all the conditions of the said contract, and shall promptly make payments to all persons supplying said William H. Flaherty labor and materials in the prosecution of the work provided
8 for in such contract, then this obligation to be void; otherwise, to remain in full force and virtue.

WM. H. FLAHERTY. [L. S.]
THE UNITED STATES FIDELITY AND GUARANTY CO. [L. S.]
EDW. J. PENNIMAN,
2nd Vice President. [L. S.]
ALBERT H. BUCK,
4th Ass't Secretary. [L. S.]

Signed and sealed in the presence of—
ALBERT C. SUPPLEE.
ALBERT C. SUPPLEE.
H. HIRAM NUSZ.

[Seal of the U. S. Fidelity and Guaranty Co.]

COUNTY OF NEW YORK, *ss:*

Herbert A. Heyn, being duly sworn, deposes and says, that he is one of the attorneys for the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is not made by Struthers Wells Company is because said Struthers Wells Company is not within the County of New York where this deponent resides. That the sources of this deponent's information and the grounds of his belief as to all the matters in said complaint not stated upon deponent's own knowledge are conversations and correspondence had with the said Struthers Wells Company and the defendants and their representatives which said correspondence and the copies thereof together with certified copies of the bond and contract referred to are now in deponent's possession all of which said papers and
9 conversations relate to the cause of action set forth in said complaint.

HERBERT A. HEYN.

Sworn to before me this 11th day of April, 1905.

BERNARD G. HEYN,
Notary Public, New York County.

[Endorsed:] Complaint.—Filed April 12, 1905.

United States Circuit Court, Eastern District of New York.

UNITED STATES (for the Use and Benefit of STRUTHERS WELLS COMPANY), Plaintiff,
against
UNITED STATES FIDELITY AND GUARANTY COMPANY, WILLIAM H. FLAHERTY, and FREDERICK M. LANDE, Defendants.

The defendant, the United States Fidelity and Guaranty Company, demurs to the complaint upon the grounds that it appears upon the face thereof:

First. That the Court has not jurisdiction of the person of the defendant, the United States Fidelity and Guaranty Company.

Second. That the Court has not jurisdiction of the subject of the action.

10 Third. That the complaint does not state facts sufficient to constitute a cause of action against this defendant, the United States Fidelity and Guaranty Company.

Wherefore, the defendant, the United States Fidelity and Guaranty Company, demands that the complaint herein be dismissed, with costs.

LEONIDAS DENNIS,
Attorney for Defendant.

Office and P. O. address, No. 66 Liberty Street, Borough of Manhattan, City of New York.

(Endorsed:) Demurrer.—Filed May 13, 1905.

JULY 17, 1905.

THE UNITED STATES, for the Use and Benefit of STRUTHERS-WELLS CO.,
vs.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY ET ALS.

Demurrer overruled, with leave to defendants to answer.

(Endorsed:) Decision.

11 At a Term of the United States Circuit Court for the Eastern District of New York, held at the Post Office Building, in said District, in the Borough of Brooklyn, on the 9th day of August, 1905.

Present: Hon. George B. Adams, District Judge, holding the Court.

UNITED STATES (for the Use and Benefit of STRUTHERS-WELLS COMPANY), Plaintiff,
against
UNITED STATES FIDELITY AND GUARANTY COMPANY, WILLIAM H. FLAHERTY, and FREDERICK M. LANDE, Defendants.

The defendant, The United States Fidelity and Guaranty Company, having demurred to the plaintiff's complaint herein, and the argument of said demurrer having been regularly brought on for argument upon the issues of law formed thereby at a Term of this Court held in said Eastern District of New York, the Court having heard the parties by their counsel, and the said defendant The United States Fidelity and Guaranty Company appearing by Leonidas Dennis, Esq., its attorney, and the plaintiff appearing by Heyn & Covington, its attorneys, and due deliberation having been had thereon,

Now, on motion of Heyn & Covington, attorneys for the plaintiff, it is

12 Ordered, that the said defendant's demurrer be and the same hereby is overruled, with leave to the said defendant to answer herein, and in the event that the said defendant does not within twenty days after the service of a copy of this order on its attorney, with notice of entry thereof, answer the said complaint, then the plaintiff may enter final judgment against the said defendant The United States Fidelity and Guaranty Company for the relief demanded in the complaint.

GEO. B. ADAMS.

(Endorsed)—Order Overruling Demurrer.—Filed and entered August 9, 1905.

United States Circuit Court, Eastern District of New York.

UNITED STATES (for the Use and Benefit of STRUTHERS-WELLS COMPANY), Plaintiff,
against
UNITED STATES FIDELITY AND GUARANTY COMPANY, WILLIAM H. FLAHERTY, and FREDERICK M. LANDE, Defendants.

COUNTY OF NEW YORK, *ss:*

Herbert A. Heyn, being duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in this action. That this action was commenced by the service of the summons and com-
13 plaint upon the defendant the United States Fidelity and Guaranty Company on the 12th day of April, 1905. That on the 11th day of May, 1905, the said defendant filed a demurrer to the said complaint. That thereafter and on the 23d day of June, 1905, the said demurrer duly came on to be heard at a Term of this Court, and on the 9th day of August, 1905, an order was duly signed and entered by Mr. Justice Adams overruling the said demurrer of the defendant the United States Fidelity and Guaranty Company, with leave, however, to the said defendant to answer the complaint herein within twenty days after the service of a copy of the said order upon the attorney for the defendant. That said order, together with notice of entry of the same, was duly served upon the attorney for the defendant the United States Fidelity and Guaranty Company on the 10th day of August, 1905. That the said defendant has not answered the complaint herein, and that the said United States Fidelity and Guaranty Company has not filed or served an answer to the said complaint, and that the time to do so pursuant to the said order of this Court has expired and that the said defendant is now in default therefore.

That no previous application has been made for the relief asked for herein.

HERBERT A. HEYN.

Sworn to before me this 6th day of September, 1905.

WILLIAM C. REDDY,
Notary Public, New York County.

(Endorsed)—Affidavit.—Filed Sept. 14, 1905.

14 At a Term of the United States Circuit Court, for the Eastern District of New York, held at the Post Office Building in said District, in the Borough of Brooklyn, on the 14th day of September, 1905.

Present: Hon. George C. Holt, District Judge, holding the Court.

UNITED STATES (for the Use and Benefit of STRUTHERS-WELLS COMPANY), Plaintiff,
against
UNITED STATES FIDELITY AND GUARANTY COMPANY, WILLIAM H. FLAHERTY, and FREDERICK M. LANDE, Defendants.

The summons and complaint herein having been duly personally served on the defendant the United States Fidelity and Guaranty Company, and the said defendant having duly appeared by its attorney, Leonidas Dennis, Esq., and demurred to the said complaint, and an order of this Court having been entered herein on the 9th day of August, 1905, overruling said demurrer with leave to the said defendant to answer herein, and in the event that the said defendant did not answer herein within twenty days after service of a copy of said order on its attorney with notice of entry thereof, then the plaintiff was given permission to enter final judgment against said defendant the United States Fidelity and Guaranty Company for the relief demanded in the complaint, and a copy of said
15 order with notice of entry thereof having been duly served upon the attorney for the said defendant on the 10th day of August, 1905, and the said defendant having failed to answer the complaint herein and its time to do so having expired, and the said defendant not having availed itself of the said leave to answer,

Now, on reading and filing the notice of motion for an order for final judgment herein dated September 6, 1905, and the affidavit of Herbert A. Heyn, one of the attorneys for the plaintiff, verified September 6, 1905, and the admission of service thereof of Leonidas Dennis, Esq., endorsed thereon, and on the pleadings and proceedings heretofore had herein, it is hereby on motion of Heyn & Covington, attorneys for the plaintiff,

Ordered, that final judgment be entered herein by the Clerk of this Court in favor of the above named plaintiff against the above named defendant the United States Fidelity and Guaranty Company for the relief demanded in the complaint, and the costs and disbursements of this action to be taxed by the Clerk and inserted in the judgment.

Enter.

GEORGE C. HOLT, *J.*

Approved as to form.

HEYN & COVINGTON,
Attorneys for Plaintiff.
LEONIDAS DENNIS,
Attorney for Defendant in Error.

(Endorsed)—Order directing entry of final judgment.—Filed and entered Sept. 14, 1905.

16 United States Circuit Court, Eastern District of New York.

UNITED STATES (for the Use and Benefit of STRUTHERS-WELLS COMPANY), Plaintiff,
against
UNITED STATES FIDELITY AND GUARANTY COMPANY, WILLIAM H. FLAHERTY, and FREDERICK M. LANDE, Defendants.

Final Judgment.

The summons and complaint herein having been duly personally served on the defendant herein, the United States Fidelity and Guaranty Company, and the said defendant having duly appeared and demurred to the said complaint, and an order of this Court having been entered herein on the 9th day of August, 1905, overruling the said demurrer, with leave to the said defendant to answer the said complaint within twenty days after the service of a copy of the said order upon the attorney for the said defendant, and a copy of said order, together with notice of entry thereof, having been duly served upon the attorney for said defendant on the 10th day of August, 1905, and the said defendant having failed to answer the complaint herein, and its time to answer having expired, and the said defendant not having availed itself of the said leave to answer said complaint, and an order having been made by this Court, on the
14th day of September, after due notice directing the Clerk
17 of this Court to enter final judgment in favor of the plaintiff against said defendant for the relief demanded in the complaint,

Now, on motion of Heyn & Covington, attorneys for plaintiff, it is hereby

Adjudged that the United States (for the use and benefit of Struthers-Wells Company, plaintiff, recover of the United States Fidelity and Guaranty Company, defendant herein, the sum of one thousand eight hundred and ninety dollars and twenty-five cents ($1,890.25), the amount claimed in the complaint, and one hundred and forty-three 94/100 dollars *and seventy-two cents* ($143.94) interest, with twenty and 4/100 dollars ($20.04) costs and disbursements, amounting in the whole to the sum of two thousand and fifty-four and 23/100 dollars ($2,054.23), and that said United States, plaintiff, have execution therefor for the use and benefit of Struthers-Wells Company against the said defendant, the United States Fidelity and Guaranty Company.

Judgment signed and entered this 14th day of September, 1905.

B. LINCOLN BENEDICT, *Clerk.*

By the Court.

By J. G. COCHRAN, *Deputy Clerk.*

(Endorsed)—Final Judgment.—Filed and entered Sept. 14, 1905.

18 United States Circuit Court, Eastern District of New York.

UNITED STATES (for the Use and Benefit of STRUTHERS-WELLS COMPANY), Plaintiff,
against
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, WILLIAM H. FLAHERTY, and FREDERICK M. LANDE, Defendants.

The United States Fidelity and Guaranty Company, defendant, feeling itself aggrieved by the order entered herein on the 9th day of August, 1905, overruling the defendant's demurrer and the judgment entered thereon on the 14th day of September, 1905, in favor of the plaintiff and against the said defendant for the sum of two thousand and fifty-four and 23/100 ($2,054.23) dollars, damages and costs, comes now by Leonidas Dennis, its attorney, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Second Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon the said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of
19 error by the United States Circuit Court of Appeals for the Second Circuit.

And your petitioner will ever pray.

LEONIDAS DENNIS,
Attorney for Defendant The United States Fidelity and Guaranty Company.

(Endorsed)—Petition for Writ of Error.—Filed October 6, 1905.

United States Circuit Court, Eastern District of New York.

UNITED STATES (for the Use and Benefit of STRUTHERS-WELLS COMPANY), Plaintiff,
against
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, WILLIAM H. FLAHERTY, and FREDERICK M. LANDE, Defendants.

Comes now the defendant, The United States Fidelity and Guaranty Company and files the following assignment of errors upon which it will rely, its prosecution of the writ of error in the above entitled cause.

First. That the United States Circuit Court in and for the Eastern District of New York erred in overruling the demurrer interposed by said defendant and plaintiff in error to the complaint filed in said cause.

20 Second. That said Court erred in overruling the first ground of the demurrer interposed by the said defendant and

plaintiff in error to the complaint filed in said cause and by adjudging and deciding that said Court had jurisdiction of the person of the defendant, The United States Fidelity and Guaranty Company.

Third. That the said Court erred in overruling the second ground of the demurrer interposed by the said defendant and plaintiff in error to the complaint filed in said cause and by adjudging and deciding that said Court had jurisdiction of the subject of said action.

Fourth. That the said Court erred in overruling the third ground of the demurrer interposed by the said defendant and plaintiff in error in the complaint filed in said cause and by adjudging and deciding that said complaint stated facts sufficient to constitute a cause of action against this defendant and plaintiff in error.

Fifth. That the said Court erred in rendering judgment against said defendant and plaintiff in error upon the pleadings in said cause and the said judgment is contrary to law and the facts as stated in the pleadings in said cause.

Wherefore, the said defendant and plaintiff in error prays that the judgment of the said Court be reversed and such directions be given that full force and efficacy may enure to said defendant by reason of the defenses set up in said demurrer filed in said cause.

LEONDIAS DENNIS,
Attorney for Defendant The United States Fidelity and Guaranty Company, Plaintiff in Error.

(Endorsed)—Assignment of Errors.—Filed October 6, 1905.

21 At a Term of the United States Circuit Court for the Eastern District of New York, held at the Post Office Building, in said District, in the Borough of Brooklyn, on the 6th day of October, 1905.

Present—Honorable Edward B. Thomas, Judge of the District Court, holding Court.

UNITED STATES (for the Use and Benefit of STRUTHERS-WELLS COMPANY), Plaintiff,
against
UNITED STATES FIDELITY AND GUARANTY COMPANY ET AL., Defendants.

Upon motion of Leonidas Dennis, Esq., attorney for defendant, The United States Fidelity and Guaranty Company, and upon filing a petition for a writ of error and an assignment of errors, it is

Ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit the judgment heretofore entered herein, and it is

Further ordered, that the amount of bond on said writ of error be, and the same hereby is, fixed at two thousand five hundred dollars, and that upon the making and filing with the Clerk of this Court of a good and sufficient bond in said sum by the said defendant, The United States Fidelity and Guaranty Company, all further proceed-

ings be superseded and stayed until the final determination of said writ of error by the said United States Circuit Court of Ap-
22 peals for the Second Circuit and until the further order of this Court.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed)—Order allowing Writ of Error, and fixing Bond.—Filed and entered October 6th, 1905.

Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

UNITED STATES (for the Use and Benefit of STRUTHERS-WELLS COMPANY), Plaintiff,
against
UNITED STATES FIDELITY AND GUARANTY COMPANY ET AL.

Bond for Damages and Costs on Appeal.

Know all men by these presents, that the Empire State Surety Company, having an office and place of business at No. 34 Pine street, in the City of New York, County and State of New York, is held and firmly bound unto the above named United States in the sum of twenty-five hundred ($2,500) dollars, to be paid to the said United States, for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents. Sealed with its seal and dated the 6th day of October, in the year 1905.

Whereas, the above named United States Fidelity and Guaranty Company has prosecuted a writ of error to the United States Circuit Court of Appeals for the Second Circuit, to reverse the final
23 judgment rendered in the above entitled suit, by the Judge of the Circuit Court of the United States for the Eastern District of New York, which said final judgment was entered on the 14th day of September, 1905;

Now, therefore, the condition of this obligation is such that if the above named United States Fidelity and Guaranty Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE EMPIRE STATE SURETY COMPANY,
[SEAL.] By EDMUND H. DRIGGS,
Vice-President.

Attest:
DANIEL STEWART, *Secretary.*

STATE AND COUNTY OF NEW YORK, *ss:*

On this 6th day of October, 1905, before me personally appeared Edmund H. Driggs, Vice-President of The Empire State Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said: That he resides in the City of New York; that he is the Vice-President of the Empire State Surety Company, the corporation described in and which executed the above instrument; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Directors of said company, and that he signed said instrument as vice-president of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720 of the New York Session Laws of 1893. And the said Edmund H. Driggs further said that he is acquainted with Daniel Stewart, and knows him to be the secretary of said company; that the signature of the said Daniel Stewart subscribed to the said instrument is
24 in the genuine handwriting of the said Daniel Stewart, and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said Edmund H. Driggs, vice-president.

CHAS. A. GARDNER,
[L. S.] *Notary Public, Kings County, N. Y.*

Certificate filed in N. Y. Co.

At a regular meeting of the Board of Directors of The Empire State Surety Company, held at the offices of the company, in the Borough of Brooklyn, New York City, on the 6th day of May, 1902, on motion it was

"*Resolved*, That the President, either of the Vice-Presidents, or Acting Vice-President, and the Secretary, Assistant Secretary, or Acting Secretary of this Company be and they hereby are authorized and empowered to execute and deliver and attach the seal of the Company to any and all bonds or other obligations for and on behalf of the Company."

STATE OF NEW YORK, *County of New York:*

I, Daniel Stewart, secretary of The Empire State Surety Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company, at the City of New York, this 6th day of October, 1905.

DANIEL STEWART, *Secretary.*

(Endorsed)—Undertaking on Appeal.—Filed October 9, 1905.

25 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, B. Lincoln Benedict, Clerk of the Circuit Court of the United States for the Eastern District of New York, in the Second Judicial Circuit, do hereby certify that the foregoing is a true transcript of the summons, complaint, demurrer, decision, order, affidavit, judgment, and appeal papers, and of the whole thereof, made up to be transmitted on writ of error of the defendant, the United States Fidelity and Guaranty Co., to the United States Circuit Court of Appeals for the Second Circuit, in the suit wherein the United States, for the use and benefit of Struthers-Wells Company, is plaintiff, and the United States Fidelity and Guaranty Company, Wm. H. Flaherty and Frederick M. Lande are defendants.

In witness whereof, I have hereunto set my hand and the seal of this Court the 2d day of November, 1905.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Eastern District of New York, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment made and entered in the said Circuit Court on the 14th day of September, 1905, between the United States for the use and benefit of Struthers-Wells Company, plaintiff, and the United States Fidelity and Guaranty Company, William H. Flaherty and Frederick M. Lande, defendants, a manifest error hath happened to the great damage of the defendant, the United States Fidelity
26 and Guaranty Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid on the 6th day of November, 1905, that the records and proceedings herein being inspected, the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 9th day of October, in the year of our Lord one thousand nine hundred and five.

B. LINCOLN BENEDICT,

[SEAL.] *Clerk of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.*

The foregoing writ is hereby allowed.

EDWARD B. THOMAS,
United States District Judge, Sitting as Circuit Judge.

(Endorsed)—Circuit Court for the Eastern District of New York, Borough of Brooklyn.—United States (for the use and benefit of Struthers-Wells Company, Plaintiff, against United States Fidelity & Guaranty Company *et al.*, defendants.—Writ of Error.—Leonidas Dennis, Att'y for the U. S. Fidelity & Guaranty Company, Office and P. O. address, No. 66 Liberty Street, Borough of Manhattan, City of New York.—Received and filed October 9th, 1905.

27 THE UNITED STATES OF AMERICA:

To the United States of America, for the use and benefit of Struthers-Wells Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Second Judicial Circuit, at the City of New York, on the 6th day of November, 1905, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Eastern District of New York, wherein The United States Fidelity and Guaranty Company is plaintiff in error, and you, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Edward B. Thomas, District Judge, sitting as Judge of the United States Circuit Court for the Eastern District of New York, on this 9th day of October, in the year of our Lord one thousand nine hundred and five.

EDWARD B. THOMAS,
United States District Judge, Sitting as Circuit Judge for the Eastern District of New York.

(Endorsed)—Circuit Court for the Eastern District of New York, Borough of Brooklyn.—United States for the use and benefit of Struthers-Wells Company), Plaintiff, against The United States Fidelity & Guaranty Company, *et al.*, Defendants.—Original Citation.—Received and filed October 12th, 1905.—Leonidas Dennis, Att'y for the U. S. Fidelity & Guaranty Company, Office and P. O. Address, #66 Liberty Street, Borough of Manhattan, City of New York.—O. K.—Heyn & Covington.—Due and timely service of within citation is hereby admitted. Dated N. Y. City, October 10, 1905. Heyn & Covington, Attys. for Plff.

28 United States Circuit Court of Appeals for the Second Circuit, No. 254.—October Term, 1905.

Argued May 2, 1906, Decided May 2, 1906.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error,
vs.
UNITED STATES, for Use and Benefit of STRUTHERS-WELLS COMPANY, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace, Townsend and Coxe.

Judgment affirmed in open Court.
Leonidas Dennis, for the Plaintiff in Error.
H. A. Heyn, for the Defendant in Error.

29 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 12th day of May one thousand nine hundred and six.

Present: Hon. William J. Wallace, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

UNITED STATES FIDELITY & GUARANTY Co., Plaintiff in Error,
vs.
UNITED STATES, for Use and Benefit of STRUTHERS WELLS COMPANY, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

W. J. W.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

30 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. U. S. F. & G. Co. *vs.* U. S. *ex rel.* Struthers Wells Co. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed May 15, 1906. William Parkin, Clerk.

31 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error,
against
THE UNITED STATES, for the Use and Benefit of STRUTHER WELLS COMPANY, Defendant in Error.

To the Honorable the Judges of the Supreme Court of the United States:

Now comes The United States Fidelity and Guaranty Company by its attorney, and complains that in the record of proceedings, and also in the rendition of the judgment of the United States Circuit Court of Appeals for the Second Circuit, in the above entitled cause, on the 12th day of May 1906, affirming the judgment of the United States Circuit Court for the Eastern District of New York, in favor of the defendant in error, the United States for the use and benefit of Struther Wells Company, and against the plaintiff in error, The United States Fidelity and Guaranty Company, for the sum of $2054.23, entered on the 14th day of September 1905 in said cause, manifest error hath intervened to the great damage of the said The United States Fidelity and Guaranty Company.

Your petitioner states that this cause was brought on or about the 12th day of April 1905, by the defendant in error, The United States for the use and benefit of Struther Wells Company, against your petitioner in the United States Circuit Court, Eastern District of New
32 York, upon a certain bond executed by your petitioner as surety, and William H. Flaherty as principal, to the United States of America, on the *the* sum of $40,000, conditioned substantially that the said William H. Flaherty should well and truly execute a certain contract between him and Col. W. A. Jones, U. S. A., Engineer of the Fifth Lighthouse District, for and in behalf of the United States for the construction and delivery of the metal work of the Baltimore Lighthouse, Maryland, according to the conditions of said contract, and should promptly make payments to all persons supplying said William H. Flaherty labor and material in the prosecution of said contract, said bond being executed in conformity with the provisions of the statute of the United States in such case made and provided, to wit, the Act of Congress approved August 13th, 1894, entitled "An act for the protection of persons furnishing materials and labor for the construction of public works." That the defendant in error sued to recover from your petitioner the sum of $1890.25 with interest from the 7th day of June 1904 the value of certain work, labor and material furnished or claimed to have been furnished by said Struther Wells Company to William H. Flaherty and Frederick M. Lande, partners under the firm name of Flaherty & Lande for use in the prosecution and completion of the work provided for in said contract between said Flaherty and Col. W. A. Jones, U. S. A. Engineer above described.

That your petitioner demurred to the complaint in said cause upon the grounds, among others, that said United States Circuit Court for the Eastern District of New York, had no jurisdiction of the subject of the action, and that the complaint did not state facts sufficient to constitute a cause of action against your petitioner, and thereafter such proceedings were had that an order of the United States Circuit Court for the Eastern District of New York, was entered on the
33 9th day of August, 1905, overruling said demurrer with leave to your petitioner to answer herein, and providing that if your petitioner did not answer within twenty days after the service of a copy of said order on its attorney with notice of entry thereof, the defendant in error might enter final judgment against your petitioner, for the relief demanded in the complaint, and thereafter your petitioner not having availed itself of its right to answer under the terms of said order, a final judgment was made and entered on the 14th day of September, 1905, in favor of the defendant in error, and against the plaintiff in error for the sum of $2054.23 the amount sued for with interest and costs, and thereafter your petitioner procured from the United States Circuit Court of Appeals for the Second Circuit, a writ of error to review said judgment, and such proceedings were had therein, that on the 12th day of May 1906, an order of the United States Circuit Court of Appeals for the Second Circuit was made and entered, affirming in all respects said final judgment with costs, and a mandate duly issued thereon to the United States Circuit Court for the Eastern District of New York, and a judgment was thereupon, and on the 6th day of July, 1906, duly entered affirming in all respects the said final judgment of September 14, 1906, with costs taxed at $31.70.

That prior to the commencement of this cause, the said Act of Congress approved August 13th, 1894, was amended by an Act of Congress, approved February 24, 1905, entitled "An Act to amend an act approved August thirteenth, eighteen hundred and ninety-four, entitled 'An Act for the protection of persons furnishing materials and labor for the construction of public works,'" and the construction of said original and amendatory acts of Congress, is involved in this cause and the amount involved herein exceeds $1000, exclusive of interest and costs.

34 Wherefore your petitioner prays for allowance of writ of error, to the end that this cause and the said judgment may be carried to the Supreme Court of the United States for review, and prays for supersedeas of said judgment and such other process as may cause the same to be corrected in said Supreme Court.

LEONIDAS DENNIS,
Attorney for The United States Fidelity and Guaranty Company.

66 Liberty Street, Borough of Manhattan, New York City.

Writ of error and supersedeas allowed and bond fixed at two thousand five hundred dollars, this 7th day of November, 1906.

E. H. LACOMBE,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

35 (Endorsed:) United States Circuit Court of Appeals, for the Second Circuit. The United States Fidelity and Guaranty Company, Plaintiff, *vs.* The United States for the use and Benefit of Struther Wells Company, Defendant. Petition for Writ of Error. Leonidas Dennis, Attorney for Plaintiff, No. 66 Liberty Street, Borough of Manhattan, New York City. Due and timely service of a copy of the within order and of notice of entry thereof is hereby admitted. Dated New York, ——, 190-. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 7, 1906. William Parkin, Clerk.

SIR: Please take notice that the within is a copy of a — this day duly made and entered herein in the office of the Clerk of ——.
Dated N. Y., ——, 190–.
Yours, &c.,

LEONIDAS DENNIS,
Attorney for —— ——.

Office and Post Office Address 66 Liberty Street, Borough of Manhattan, New York City.

To —— ——, Esq., Attorney for —— ——.

SIR: Please take notice that the within order will be presented for settlement to Hon. —— ——, Justice at a —— of this Court, appointed to be held at the ——, in the Borough of ——, City of New York, on the — day of ——, at —— o'clock A. M., on said day.
Dated N. Y., 190–.

LEONIDAS DENNIS,
Attorney for —— ——.

66 Liberty Street, Borough of Manhattan, New York City.

To —— ——, Esq., Attorney for ——.

COUNTY OF ——, *ss:*

—— ——, being duly sworn, deposes and says, that on the — day of ——, 190–, at No. ——, in the Borough of ——, City of New York, he served a copy of the annexed —— upon —— —— to him known to be the Attorney for the —— in the within entitled action, by delivering the same to and leaving it with a person having charge of the office of said Attorney during the absence of said Attorney therefrom.
Sworn to before me this — day of ——, 190–.

—— ——.

36 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error,
against
THE UNITED STATES for the Use and Benefit of STRUTHER WELLS COMPANY, Defendant in Error.

Now comes the plaintiff in error, The United States Fidelity and Guaranty Company, and says that in the record, and proceedings in the above entitled cause in the United States Circuit Court of Appeals for the Second Circuit, there is manifest error in this, to wit:

First. That the United States Circuit Court of Appeals for the Second Circuit erred in affirming the judgment of the United States Circuit Court for the eastern District of New York, overruling the demurrer interposed by the plaintiff in error to the complaint filed in said cause.

Second. That said United States Circuit Court of Appeals for the Second Circuit, erred in affirming the judgment of the United States Circuit Court for the Eastern District of New York, overruling the first ground of the demurrer interposed by the plaintiff in error, to the complaint filed in said cause, and by adjudging and deciding that said Circuit Court of the United States for the Eastern District of New York, had jurisdiction of the person of the plaintiff in error.

37 Third. That the said United States Circuit Court of Appeals for the Second Circuit, erred in affirming the judgment of the Circuit Court of the United States for the Eastern District of New York, overruling the second ground of the demurrer interposed by the plaintiff in error to the complaint filed in said cause, and by adjudging and deciding that said Circuit Court of the United States for the Eastern District of New York, had jurisdiction of the subject of said cause, and said Circuit Court of the United States for the Eastern District of New York, erred in overruling the second ground of the demurrer interposed by the plaintiff in error, to the complaint filed in said cause, and by adjudging and deciding that said Circuit Court of the United States for the Eastern District of New York, had jurisdiction of the subject of said cause.

Fourth. That the said Circuit Court of Appeals for the Second Circuit erred in affirming the judgment of the United States Circuit Court for the Eastern District of New York, overruling the third ground of the demurrer interposed by the said plaintiff in error to the complaint filed in said cause, and by adjudging and deciding that said complaint stated facts sufficient to constitute a cause of action against this plaintiff in error.

Fifth. That said Circuit Court of Appeals for the Second Circuit, erred in affirming the judgment of the United States Circuit Court for the Eastern District of New York, rendering judgment against the plaintiff in error, upon the pleadings in said cause, and said

judgment is contrary to law, and the facts as stated in the pleadings in said cause.

Wherefore the said plaintiff in error prays that the judg-
38 ment of the Circuit Court of Appeals for the Second Circuit, and the judgment of the Circuit Court of the United States for the Eastern District of New York, be reversed and such directions be given that full force and efficacy may enure to said plaintiff in error by reason of the defences set up in said demurrer filed in said cause.

LEONIDAS DENNIS,
Attorney for Plaintiff in Error, The United States Fidelity and Guaranty Company.

Office & P. O. Address, #66 Liberty Street, Borough of Manhattan, City of New York.

39 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. The United States Fidelity and Guaranty Company plaintiff in error *vs.* The United States for the Use and Benefit of Struther Wells Company defendant in error. Assignment of Errors. Leonidas Dennis, Attorney for plaintiff in error, No. 66 Liberty Street Borough of Manhattan, New York City. Due and timely service of a copy of the within order and of notice of entry thereof is hereby admitted. Dated New York, —— 190-. Attorney for —— ——. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 7, 1906. William Parkin, Clerk.

SIR: Please take notice that the within is a copy of a — this day duly made and entered herein in the office of the Clerk of ——.
Dated N. Y., ——, 190-.
Yours, &c.,
LEONIDAS DENNIS,
Attorney for —— ——.

Office and Post Office Address, 66 Liberty Street, Borough of Manhattan, New York City.

To —— ——, Esq., Attorney for —— ——.

SIR: Please take notice that the within order will be presented for settlement to Hon. —— ——, Justice at a —— of this Court, appointed to be held at the —— in the Borough of —— City of New York, on the — day of ——, at — o'clock A. M. on said day.
Dated N. Y., ——, 190-.
LEONIDAS DENNIS,
Attorney for —— ——.

66 Liberty Street, Borough of Manhattan, New York City.

To —— ——, Esq., Attorney for —— ——.

COUNTY OF ——, *ss:*

—— —— being duly sworn, deposes and says, that on the — day of ——, 190- at No. — in the Borough of —— City of New

York, he served a copy of the annexed — upon —— ——, to him known to be the Attorney for the —— in the within entitled action, by delivering the same to and leaving it with a person having charge of the office of said Attorney during the absence of said Attorney — therefrom.

Sworn to before me this — day of ——, 190-.

—— ——.

40 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error,
against
THE UNITED STATES for the Use and Benefit of STRUTHER WELLS COMPANY, Defendant in Error.

Bond for Damages and Costs of Appeal.

Know all men by these presents that The Title Guaranty & Surety Company, a corporation of the State of Pennsylvania, having an office and place of business at 277 Broadway, in the City, County and State of New York, is held and firmly bound unto the above named United States for the use and benefit of Struther Wells Company in the sum of Three thousand (3,000.) Dollars, to be paid to said United States for the use and benefit of Struther Wells Company, for the payment of which well and truly to be made, it binds itself, its successors and assigns jointly and severally, firmly by these presents.

Sealed with its seal and dated the 3rd day of November in the year one thousand nine hundred and six.

Whereas the above named The United States Fidelity and Guaranty Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the final judgment rendered in the above entitled suit by the United States Circuit Court of Appeals for the Second Circuit entered on the 12th day of May 1906

41 affirming in all respects with costs the final judgment made and entered in the above entitled suit by the United States Circuit Court for the Eastern District of New York, in favor of the defendant in error, the United States for the use and benefit of Struther Wells Company, and against the plaintiff in error, The United States Fidelity and Guaranty Company, for the sum of Two thousand and fifty-four and 23/100 (2054.23) Dollars, entered on the 14th day of September 1905.

Now, therefore, the condition of this obligation is such that if the above named The United States Fidelity and Guaranty Company shall prosecute said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE TITLE GUARANTY & SURETY COMPANY,
By R. DE F. BAYLEY, *Attorney-in-Fact.*

Attest:
[SEAL.] O. WILSON GOTT, *Resident Secretary.*

42 *Form of Affidavit, Acknowledgment and Justification by Guaranty or Surety Company.*

The Title Guaranty & Surety Company.

STATE OF NEW YORK,
County of New York, City of New York, ss:

On this 3rd day of November, one thousand nine hundred and six, before me personally came R. De F. Bayley, known to me to be the Attorney-in-fact of The Title Guaranty & Surety Company, the corporation described in and which executed the annexed bond of The United States Fidelity & Guaranty Co., as Surety thereon, and who, being duly sworn, deposes and says that he resides in The City of New York, State of New York, that he is the Attorney-in-fact of said The Title Guaranty & Surety Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Pennsylvania; that said company has complied with the provisions of the Act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond (Form —) of the U. S. F. & G. Co., is the corporate seal of said The Title Guaranty & Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney-in-fact of said company; and that he is acquainted with O. Wilson Gott and knows him to be the Resident Secretary of said Company; and that the signature of said O. Wilson Gott subscribed to said bond is in the genuine handwriting of said O. Wilson Gott, and was thereto scribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00).

R. DE F. BAYLEY,
Attorney-in-fact.

Sworn to, acknowledged before me, and subscribed in my presence this 3rd day of Nov. 1906.

[SEAL.] GEO. W. YUENGLING,
Notary Public.

Notary public, New York County, No. 13, Cert. filed in Kings Co.

43 [Endorsed:] United States Circuit Court of Appeals. The United States Fidelity and Guaranty Company, Plaintiff in error against The United States for the Use and Benefit of Struther Wells Company, Defendant in error. Appeal Bond. Surety: The Title Guaranty & Surety Company 277 Broadway. Approved as to form and also as to sufficiency of sureties, with reservation, how-

ever, to the — of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. E. H. Lacombe, U. S. Circuit Judge. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 7, 1906. William Parkin, Clerk.

44 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 43 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States Fidelity & Guaranty Company against United States for use and benefit of Struthers Wells Company, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 9th day of November, in the year of our Lord One Thousand Nine Hundred and *Ninety-* and of the Independence of the said United States the One Hundred and thirty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals for the Second Circuit, before you or some of you, between The United States Fidelity and Guaranty Company, plaintiff in error, and the United States for the use and benefit of Struther Wells Company, defendant in error, manifest error hath happened to the great damage of the said plaintiff in error, as by *his* complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of United States, the 7th day of November in the year of our Lord one thousand nine hundred and six.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

Allowed by—
E. H. LACOMBE,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

46 [Endorsed:] United States Circuit Court of Appeals, for the Second Circuit. The United States Fidelity and Guaranty Company, plaintiff in error, *vs.* The United States for the use and benefit of Struther Wells Company, defendant in error. Writ of error. Leonidas Dennis, Attorney for plaintiff in error, No. 66 Liberty Street, Borough of Manhattan, New York City. Service of a copy of the within writ of error is hereby admitted. Dated New York, November 7th, 1906. Heyn & Covington, Attorney- for def't in error. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 9, 1906. William Parkin, Clerk.

SIR: Please take notice that the within is a copy of a — this day duly made and entered herein in the office of the Clerk of ——.
Dated N. Y., ——, 190-.
Yours, &c.,
LEONIDAS DENNIS,
Attorney for —— ——.

Office and Post Office Address, 66 Liberty Street, Borough of Manhattan, New York City.

To —— ——, Esq., Attorney for —— ——.

SIR: Please take notice that the within order will be presented for settlement to Hon. —— ——, Justice at a —— of this Court, appointed to be held at the —— in the Borough of —— City of New York, on the — day of ——, at — o'clock A. M. on said day.
Dated N. Y., ——, 190-.

LEONIDAS DENNIS,
Attorney for —— ——, 66 Liberty Street, Borough of Manhattan, New York City.

To —— ——, Esq., Attorney for —— ——.

COUNTY OF ——, *ss:*

—— ——, being duly sworn, deposes and says, that on the — day of ——, 190- at No. — in the Borough of —— City of New York, he served a copy of the annexed — upon —— —— to him known to be the Attorney for the —— in the within entitled action, by

delivering the same to and leaving it with a person having charge of the office of said Attorney during the absence of said Attorney therefrom.

Sworn to before me this — day of ——, 190-.

—— ——.

47 UNITED STATES OF AMERICA, *ss:*

To the United States, for the Use and Benefit of Struther Wells Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein The United States Fidelity and Guaranty Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of November in the year of our Lord one thousand nine hundred and six.

[Seal United States Circuit Court of Appeals, Second Circuit.]

E. H. LACOMBE,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

Service of the foregoing citation and error is admitted this 7th day of November, 1906.

HEYN & COVINGTON,
Attorney and Counsel for the United States, for the Use and Benefit of Struther Wells Company, Defendant in Error.

48 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. The United States Fidelity and Guaranty Company, plaintiff in error, *vs.* The United States for the use and benefit of Struther Wells Company, defendant in error. Citation. Leonidas Dennis, Attorney for plaintiff in error, No. 66 Liberty Street, Borough of Manhattan, New York City. Due and timely service of a copy of the within citation is hereby admitted. Dated New York, November 7th, 1906. —— ——, Attorney for def't in error. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 9, 1906. William Parkin, Clerk.

SIR: Please take notice that the within is a copy of a — this day duly made and entered herein in the office of the Clerk of ——.

Dated N. Y., ——, 190-.

Yours, &c.,

LEONIDAS DENNIS,
Attorney for —— ——.

Office and Post Office Address, 66 Liberty Street, Borough of Manhattan, New York City.

To —— ——, Esq., Attorney for —— ——.

SIR: Please take notice that the within order will be presented for settlement to Hon. —— ——, Justice at a —— of this Court, appointed to be held at the —— in the Borough of —— City of New York, on the — day of ——, at — o'clock A. M. on said day.

Dated N. Y., ——, 190-.

LEONIDAS DENNIS,
Attorney for —— ——.

66 Liberty Street, Borough of Manhattan, New York City.

To —— ——, Esq., Attorney for —— ——.

COUNTY OF ——, *ss:*

—— ——, being duly sworn, deposes and says, that on the — day of ——, 190- at No. — in the Borough of —— City of New York, he served a copy of the annexed — upon —— —— to him known to be the Attorney for the —— in the within entitled action, by delivering the same to and leaving it with a person having charge of the office of said Attorney during the absence of said Attorney therefrom.

Sworn to before me this — day of ——, 190-.

—— ——..

Endorsed on cover: File No. 20,459. U. S. circuit court appeals, 2d circuit. Term No. 154. The United States Fidelity and Guaranty Company, plaintiff in error, *vs.* The United States, for the use and benefit of Struther Wells Company. Filed November 17th, 1906. File No. 20,459.

Supreme Court of the United States.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

Plaintiff-in-Error.

against

THE UNITED STATES FOR THE USE AND BENEFIT OF STRUTHER WELLS COMPANY,

Defendant-in-Error.

No. 154.

In error to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

Statement of Facts.

This cause comes on for hearing before this Court upon a writ of error procured by The United States Fidelity and Guaranty Company to review the final judgment entered by the Circuit Court of the United States for the Eastern District of New York, in favor of the United States for the use and benefit of Struther Wells Company, and

against the United States Fidelity and Guaranty Company for the sum of Two thousand and fifty-four and 23/100 ($2,054.23) dollars, and judgment of affirmance entered by the Circuit Court of Appeals (pp. 9, 14, 15, 16, 24 and 25). The summons and complaint were served upon the defendant, The United States Fidelity and Guaranty Company, on April 12th, 1905, and thereafter said company appeared in said action and served a demurrer to the complaint upon the grounds that it appears upon the face thereof:

FIRST: That the Court has not jurisdiction of the person of the defendant, The United States Fidelity and Guaranty Company.

SECOND: That the Court has not jurisdiction of the subject of the action.

THIRD: That the complaint does not state facts sufficient to constitute a cause of action against the defendant, The United States Fidelity and Guaranty Company (p. 5).

The demurrer was overruled with leave to the defendant, The United States Fidelity and Guaranty Company, to answer within twenty days, and the order overruling the demurrer provided that if said defendant should not answer within said time the plaintiff might enter final judgment against it for the relief demanded in the complaint (p. 6). The defendant did not answer, and on September 14th, 1905, final judgment was entered in favor of the plaintiff and against the said defendant for the sum of Two thousand and fifty-four and 23/100 ($2,054.23) dollars (Papers on Appeal, p. 9).

A writ of error to the Circuit Court of Appeals for the Second Circuit was allowed on October 6th, 1905 (pp. 11-12), and judgment of affirmance was thereafter rendered by said Circuit

Court of Appeals (p. 16). A writ of error was allowed by said Circuit Court of Appeals on November 7th, 1906 (pp. 24-25).

The only questions before this Court are the questions of law raised by the demurrer above referred to.

It appears from the complaint that the defendant, The United States Fidelity and Guaranty Company, as surety, and the defendant, William H. Flaherty, as principal, executed a certain bond to the United States of America in the sum of Forty thousand ($40,000) dollars, dated December 10th, 1903, conditioned that the said defendant William H. Flaherty should well and truly execute the contract between him and Colonel W. A. Jones, United States Engineer for the United States, for the construction and delivery of the metal work for the Baltimore Lighthouse, Maryland, and should promptly make payments to all persons supplying him labor and material in the prosecution of the work provided for in said contract (pp. 2, 3, 4). After the execution of the contract bond, the defendant Flaherty associated with himself as co-partner, Frederick M. Lande, under the firm name of Flaherty & Lande, to perform and carry out said contract with the United States (p. 3). Struther Wells Company about March, 1904, furnished the said Flaherty & Lande certain labor and material of the reasonable value and agreed price of One thousand and eight hundred and ninety and 25/100 ($1,890.25) dollars, to be used in the performance of said contract, and the same was so used in the performance thereof (pp. 3 and 4). No part of said sum of money has been paid (p. 4).

The errors relied upon by the plaintiff-in-error to reverse the final judgment of the Circuit Court for the Eastern District of New York, and the

judgment of affirmance of the Circuit Court of Appeals, Second Circuit, are as follows:

FIRST: That the United States Circuit Court of Appeals for the Second Circuit erred in affirming the judgment of the United States Circuit Court for the Eastern District of New York, overruling the demurrer interposed by the plaintiff in error to the complaint filed in said cause.

SECOND: That said United States Circuit Court of Appeals for the Second Circuit erred in affirming the judgment of the United States Circuit Court for the Eastern District of New York, overruling the first ground of the demurrer interposed by the plaintiff-in-error, to the complaint filed in said cause, and by adjudging and deciding that said Circuit Court of the United States for the Eastern District of New York, had jurisdiction of the person of the plaintiff-in-error.

THIRD: That the said United States Circuit Court of Appeals for the Second Circuit, erred in affirming the judgment of the Circuit Court of the United States for the Eastern District of New York, overruling the second ground of the demurrer interposed by the plaintiff-in-error to the complaint filed in said cause, and by adjudging and deciding that said Circuit Court of the United States for the Eastern District of New York, had jurisdiction of the subject of said cause, and said Circuit Court of the United States for the Eastern District of New York, erred in overruling the second ground of the demurrer interposed by the plaintiff-in-error, to the complaint filed in said cause, and by adjudging and deciding that said Circuit Court of the United States for the Eastern District of New York, had jurisdiction of the subject of said cause.

FOURTH: That the said Circuit Court of Appeals for the Second Circuit erred in affirming the judgment of the United States Circuit Court for the Eastern District of New York, overruling the third ground of the demurrer interposed by the said plaintiff-in-error to the complaint filed in said cause, and by adjudging and deciding that said complaint stated facts sufficient to constitute a cause of action against this plaintiff-in-error.

FIFTH: That said Circuit Court of Appeals for the Second Circuit, erred in affirming the judgment of the United States Circuit Court for the Eastern District of New York, rendering judgment against the plaintiff-in-error, upon the pleadings in said cause, and said judgment is contrary to law, and the facts as stated in the pleadings in said cause.

POINT I.

The question of jurisdiction depends upon the law as it was when the jurisdiction of the Circuit Court was invoked.

The above action was commenced on April 12th, 1905, subsequent to the enactment of Chapter 778 of U. S. Statutes at Large, 1904-5, page 811, which was passed February 24th, 1905, and prescribes, among other things, the procedure to be followed by materialmen in enforcing claims against the surety on a bond of the nature of the one sued on herein. This law, which was in force at the time of the commencement of this action, prohibits a materialman from commencing any action until after the complete performance of the contract, for the performance of which the bond was given, and the expiration of six months without the United

States commencing an action, and further provides that but one suit shall be brought on said bond, and all materialmen shall file their claims in such suit.

Though the cause of action of the plaintiff arose before the passage of Chapter 778, this action was not started until after the enactment of this law and the provisions therein contained regulating the enforcement of such cause of action apply to this action as they do not affect the cause of action itself, but only the method of enforcing the same.

Larkins vs. Saffarans, 15 Fed. Rep., 147.

Am. Eng. Enc. of Law, Vol. 26, p. 695.

Endlich on Interpretation of Statutes, Sec. 287.

The first statute requiring a contractor, who entered into a contract for the construction of a public building or public work of the United States, to furnish a bond, conditioned that such contractor should promptly make payment to all persons supplying him labor or material in the prosecution of the work provided for in such contract, was Chapter 280, passed August 13, 1894, United States Compiled Statutes, Vol. 2, page 2523. This statute was the one in force at the time of the execution of the bond sued on and at the time the cause of action of the plaintiff arose.

This law was defective in that no method was provided by which all materialmen were protected or by which the surety could protect himself from harassing litigation and the hazard of being compelled to pay more than the amount of its liability in case the claims of the materialmen and the United States aggregated more than the penalty of this bond. The defects in the law in this respect were made apparent by the decision in the

case of the *American Surety Company vs. The Lawrenceville Cement Company,* 96 Fed. Rep., 25. There certain suits had been brought against the American Surety Company, the surety upon the bond of the contractor to the United States government, and the claims of the plaintiffs in these actions, together with the claims of the matrialmen who had not commenced action, and the unliquidated claim of the United States aggregated more than the penalty of the bond of the Surety Company. The Surety Company filed an ancillary bill making defendants the materialmen who had commenced actions against it on the law side of the court, and it was held that such a bill could be maintained. Though this decision decided the procedure which could be pursued by the surety to protect itself, yet the procedure pursued by the surety and approved of by the Court was a most cumbersome, expensive and defective one. In such a suit, the United States could not be made a party; only materialmen who had instituted actions on the law side could be made defendants; the claims of such materialmen must be admitted or the actions brought by them could not be restrained until judgment had been entered therein; the surety was liable for taxable costs in all actions in which valid claims were established; materialmen could institute actions before the contract was completed and while the loss of the government was unascertained; and only partial distribution could be directed until the loss of the government was finally fixed and many other technical difficulties existed.

The most striking and important defect in the law of 1894 was the failure to provide a method of procedure which protected all parties, the United States, materialmen and the surety, when the aggregate amount of claims exceeded the penalty of

the bond. It was to remedy this mischief that the amended law was passed, and consequently it should be construed so as to terminate at the earliest possible time the mischief sought to be remedied by the Congress.

This act, however, was amended by Act of February 24 1905, Chapter 778, 1904-5, before the commencement of this action.

The provisions of the old law and the amendment as to the condition of the bond are identical, except for the insertion of the word "with" in the amended law, and are as follows:

> "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them (with) labor and materials in the prosecution of the work provided for in such contract."

The old law, however, contained no specific provisions for the enforcement of claims on said bond except that materialmen, upon complying with certain formalities therein set forth:

> "shall have a right of action and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution."

The rule of construction that the provisions of the amendment, which affect the remedy but not the right itself, apply to causes of action existing when the amendment was passed is strengthened

in this case by the application of the most important rule of construction, that the old law, the mischief and the remedy are to be considered carefully in determining the intent of the Legislature.

This is well expressed in the case of *American Tobacco Company vs. Werchmeister,* 207 U. S., 284, where the Court says, on page 293:

> "But in construing a statute, we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment, so as to effectuate rather than destroy the spirit and force of the law which the Legislature intended to enact."

It is true that the amended law contains some provisions which deal with substantive rights and not with procedure. The fact that the law contains such provisions does not in any way affect the construction of the provisions which deal with procedure only. The most important provision in the law which deals with substantive rights is the one conferring a preference upon the United States over all other creditors. The construction of that portion of the statute depends upon the rules applicable to such a provision. It will be construed to apply to bonds executed subsequent to the enactment of the statute and to such bonds only. The provisions dealing with procedure, however, will be held to apply to bonds executed prior to the enactment of the statute and to causes of action existing at that time.

The Court, in construing the amendment of 1905, will endeavor to give effect to every part of the law according to the intent of Congress. There is no difficulty in so construing the law.

The amended law in so far as it deals with procedure applies to all actions instituted subsequent

to its passage, but it does not confer upon the United States any additional rights or interfere with the rights of creditors under any bond executed prior to the enactment of the statute. The statute provides that in an action brought by the United States, any creditor of the contractor may intervene and be made a party and have his rights and claims adjudicated in such action and judgment rendered thereon subject, however, to the priority of the claim and judgment of the United States. That is, if the bond was executed subsequent to the passage of this statute, the creditors' rights are subject to the preference conferred therein on the United States. If, however, the bond was executed prior to the passage of the act, the United States has no preference and consequently there is no priority on its part to which the creditors' rights are subject, and in such a case it would only be entitled to share *pro rata* with the other creditors. The amended act further provides that if the full amount of the liability of the surety on the bond is insufficient to pay the full amount of the claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata* among the interveners. *The full amount due the United States depends upon whether the bond was executed prior or subsequent to the enactment of the statute.* If prior, the full amount due is its *pro rata* share. If subsequent, the full amount of its claims regardless of the claims of the other creditors.

Although it is admittedly true that the contract with the United States was entered into, the undertaking given on behalf of the contractor, and the goods furnished by the materialman to the contractor, prior to the passage of the act of February 24, 1905, yet the cause of action herein was not

brought or instituted by the materialman, Struther Wells Company, against the Surety herein until the 12th day of April, 1905, the date when the summons was issued, almost two months after the passage of the act of February 24th, 1905, an act which was passed with the view of superseding and remedying the defects in the former act of 1894, Chapter 280, and changing the procedure thereof.

The defendant in error had full knowledge of the passage of the later act of 1905, as is evidenced by its express statement in its bill of complaint that its bill is brought under the act of August 13th, 1894, and under the mistaken notion that it had an election as to which act it would rely on in its procedure in the institution of its suit.

We respectfully submit that the defendant in error, having delayed the bringing of its action against the Surety herein until after the passage of the Act of 1905, is precluded thereby, and it has no election whatever in the premises, but must follow the procedure as laid down for the prosecution of such actions and the procedure thereof by the terms of the later act, viz: the act of February 24th, 1905.

Furthermore, as the Act of 1905 states no specific time in which that act is to take effect, the Act of February 24th, 1905, took effect on the day on which it was passed, and that thereafter all proceedings instituted by materialmen, as in this action, must be prosecuted under the Act of 1905, and its procedure followed.

This point being well taken, it relieves the Act of 1905 of any retrospective effect, and leaves it to take effect immediately upon its passage, and is the proper method of procedure from and after

the 24th of February, 1905, whenever the jurisdiction of the Circuit Court is invoked.

Again, the Act of 1905 does not refer to cases pending at its passage, and it surely could not refer back to causes of action which had not accrued, and for which no actions had been brought, and the jurisdiction of the Court had not been invoked.

Mr. Justice Harlan is very specific on this point in his opinion in the case of *United States Fidelity and Guaranty Company vs. Kenyon*, reported in 204 U. S., on page 359, where he says:

> "As the Act of 1905 does not refer to cases pending at its passage, the question of jurisdiction depends upon the law as it was when the jurisdiction of the Circuit Court was invoked in this action."

The jurisdiction of the Circuit Court in this case was not invoked until the 12th day of April, 1905, two months after the passage of the Act of February 24th, 1905, and after the law went into effect, and the defendant in error was precluded, by the passage of the Act of 1905, from bringing his action under the Act of 1894, and was bound to institute its proceeding under the act which was then in force, viz: the act of February 24th, 1905.

POINT II.

The Court has no jurisdiction over the subject of this action.

The law of February 24th, 1905, expressly provides that a creditor of the contractor bringing suit upon the bond is authorized to bring it in the name of the United States in the Circuit Court of the United States in the district in

which such contract was to be performed and executed irrespective of the amount in controversy in such suit *and not elsewhere.* The contract was to be performed in Baltimore, Md.

The Circuit Courts of the United States are courts of statutory creation and jurisdiction. They are not established by the constitution of the United States. They have only the jurisdiction conferred upon them by statute. Whatever jurisdiction they might have had over such an action as this under other statutes prior to the enactment of the law of February 24, 1905, the jurisdiction conferred by such other statutes was repealed by the passage of this act. The only court which has jurisdiction over a cause of action upon a bond like that involved in this cause is the Circuit Court in the district in which the contract was to be performed and executed. The prohibition against other courts exercising jurisdiction, is equivalent to a repeal. In *Insurance Company vs. Ritchie,* 72 U. S., 541, the Court said, at page 544:

> "And it is equally clear that when a jurisdiction conferred by statute is prohibited by a subsequent statute the prohibition is, so far, a repeal of the statute conferring the jurisdiction."

When a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall within the law.

Railroad Co. vs. Grant, 98 U. S., 398.

Assessors vs. Osborne, 76 U. S., 567.

Sherman vs. Grinnell, 123 U. S., 679.

Gurnee vs. Patrick County, 137 U. S., 141.

McNulty vs. Batty, 51 U. S., 71.

Insurance Co. vs. Ritchie, 72 U. S., 541.

Ex parte McCardle, 74 U. S., 506, 514.

National Exchange Bank vs. Peters, 144 U. S., 570.

Fairchild vs. U. S. 91 Fed. Rep., 297.

In *Railroad Company vs. Grant*, supra, it was decided that when a writ of error was taken from a judgment for Two thousand two hundred and fifty (2,250) dollars and the Court at the time the writ of errors was sued out had jurisdiction, if the amount in dispute was One thousand ($1,000) dollars or more but before the writ was heard, a statute was passed giving jurisdiction when the amount involved was Two thousand five hundred (2,500) dollars or more, the Court was without jurisdiction to review the judgment.

If when a law conferring jurisdiction is repealed without any reservation as to pending cases all such cases fall within the law *a fortiori*, such a repeal would apply to actions not yet instituted.

POINT III.

The only vested right conferred on defendant in error by statute of August 13th, 1894, is the right to a pro rata share in the amount of the bond after the contract has been completed, and the statute of February 24th, 1905, does not take away this right.

In the Circuit Court of Appeals, counsel for defendant-in-error contended that the statute of February 24th, 1905, only applied to bonds executed subsequent to its passage. They conceded the broad general rule that statutes governing procedure take effect immediately, and upon causes

of action existing at the time of their passage, but contended that such a rule should not apply to this particular statute because (1) to so apply it would take away their right to an immediate cause of action, and (2) it would impair the obligation of their contract.

Considerable confusion was created by their failing to distinguish between the giving of a retroactive effect to a statute, and having a statute take effect immediately upon a cause of action then in existence. See *Larkins vs. Saffarans,* 15 Fed., 147

The contention of plaintiff-in-error, is that the statute of February 24th, 1905, being remedial in character and effecting the procedure, should take effect immediately, but it is not contended that if part of the statute takes away a substantial right of defendant-in-error, that the statute should be given a retroactive effect as to that particular part.

To show that the Act of February 24th, 1905, deals more with the procedure, than with the right, it is necessary to show just what are the rights under the statute of August 13th, 1894, for which defendant-in-error is contending so strongly.

The former statute gave the materialman the right to bring suit against the Surety in the name of the United States. This right was construed in the case of *American Surety Company vs. Lawrenceville Cement Co.,* 96 Fed., 25.

In that case it was held that the United States had voluntarily made itself trustee alike for its own interest, and for the interest of all individuals intended to be protected, and that the equitable rule of pro rata distribution should be applied. The right, therefore, of defendant-in-error is a right to a pro rata share in a final distribution, and not a right to an immediate cause of action against the Surety, with a right to recover a judgment in

full for their claim. The amount of their pro rata share can only be accurately determined when the contract has been completed. If this is borne in mind when reading the statute of February 24th, 1905, it can be seen that the statute, instead of taking away the right, was passed for the purpose of protecting the right.

Defendant-in-error in the Court below seemed to wish to create the impression that their right consisted in a right to an immediate cause of action for the value of the material supplied by them to the contractors, irrespective of the claims of other materialmen or laborers. This, it is submitted, is incorrect, and the statute of August 13th, 1894, gives defendant-in-error no vested interest in the time when their action could be brought. The only vested right given by such statute is the right to share pro rata to the extent of the amount of the bond, and this right is not taken away by statute of February 24th, 1905.

POINT IV.

The Legislature may change, as well as create, a limitation, provided adequate means of enforcing the right remain, and the materialman here has no vested interest in the form of the action to be commenced, or the mode or remedy to be applied.

It has also been contended that the new statute prescribes a new limitation where none existed before.

It is a well established rule that statutes prescribing a new or different limitation take effect immediately.

Sohn vs. Waterson, 17 Wall, 596.
Terry vs. Anderson, 95 U. S., 628.
Wilson vs. Kreminger, 185 U. S., 63.

In *Sohn vs. Waterson*, it was held that in construing a statute of limitation insofar as it effects a right of action in existence when the statute was passed, it must be held in the absence of contrary provision, to begin to run when the cause of action first became subject to its operation. Hence, when a statute of limitation barred a right of action within two years after the cause of action had accrued, the Court held that the two year limitation started to run from the date of the passage of the statute on a cause of action that accrued prior to the passage of such statute.

In *Terry vs. Anderson*, supra, a statute was upheld that reduced the time prescribed by the statute in force when the cause of action accrued. The Court in this case stated on page 633:

> "It is difficult to see why, if the Legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced, and as to the forms of action or modes of remedy. It is well settled that the Legislature may change them at its discretion provided adequate means of enforcing the right remain."

In the cases cited by counsel for defendant-in-error, in his brief in the United States Circuit Court of Appeals, *South Western Coal Company vs. McBride*, 185 U. S., 499, and *U. S. vs. Heth*, 3 Cranch., 413, the statutes in question all affected

the right itself, and took away or changed in a substantial manner that right. That is not so in this case, as the right itself, i. e., the right to a pro rata share remains.

The following cases were cited by counsel for defendant-in-error in support of his contention that as the remedy prescribed by the statute of August 13th, 1894, was a part of his contract, the provisions of the statute of February 24th, 1905, would impair the obligation of their contract.

Von Hoffman vs. Quincy, 4 Wall, 458.
Edwards vs. Kearzey, 96 U. S., 595.
Siebert vs. Lewis, 122 U. S., 284.

In all of these cases the remedy has been so affected by amending the statute as to make the original remedy a nullity. In the first case cited (*Von Hoffman vs. Quincy*) the right to a special tax was taken away. In the second case (*Edwards vs. Kearzey*) the new statute excepted so much additional property from execution, that the remedy of execution provided for under the old statute was useless.

In all of these cases it was apparent that the new statute had so affected the right embodied in the contract, that the obligation of such contract was impaired. It is the contention of the plaintiff-in-error that the statute of February 24th, 1905, can be so interpreted, as not to affect the substantive rights of materialmen, or to impair the obligation of their contracts.

In *Oshkosh Water Works Co. vs. Oshkosh*, 187 U. S., 437, Justice Harlan says on page 439:

> "It is well settled that while in a general sense the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing * * *, but

it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts; provided a substantial or efficacious remedy is given by means of which a party can enforce his rights under the contract.

POINT V.

The complaint does not state that the contract, for the performance of which the bond was given, has been fully completed, and that six months had expired since such completion and before the commencement of this action without the United States starting suit on said bond.

The completion of the contract for the performance of which the bond was given, and the expiration of six months after such completion without the United States starting suit on said bond, are conditions precedent to a materialman commencing a suit on said bond.

It has been contended that the materialman has not, under the statute of February 24th, 1905, an unconditional right of action, but must wait until after the completion of the contract. Although the statute of February 23rd, 1905, in terms so the statute of February 24th, 1905, in terms so provides, this provision is not a material change in the right of the materialman as, under the former statute, their right to a pro rata share could only be determined after the contract had been completed.

Lawrenceville Cement Co. vs. American Surety Co., supra.

POINT VI.

The judgment of the lower court should be reversed and the complaint dismissed with costs.

Respectfully submitted,

LEONIDAS DENNIS,

Attorney for Plaintiff-in-Error.

MAR 4 1908
JAMES H. McKENNEY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1907.

No. 154.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

Plaintiff-in-Error,

vs.

THE UNITED STATES OF AMERICA (for the use and benefit of STRUTHERS WELLS COMPANY),

Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

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Supreme Court of the United States,

OCTOBER TERM, 1907.

UNITED STATES FIDELITY & GUARANTY COMPANY, Plaintiff-in-Error, against UNITED STATES (for the use and benefit of Struthers Wells Company), Defendant-in-Error.	No. 154.

BRIEF OF DEFENDANT-IN-ERROR.

Statement.

The "Statement of Facts" contained in the brief of the plaintiff-in-error is substantially correct.

It is to be noted that the bond in suit herein is annexed to the complaint, and, as appears from the latter, was given *pursuant to the Act of Congress, approved August 13, 1894* (fols. 4, 5). The bond is at page 4 of the record and follows verbatim the provisions of that Act. The contract with the United States was made and the bond was given December 10, 1903, and the material was furnished by Struthers Wells Company, for whose use and benefit the action was brought, in March, 1904.

The Act of August 13, 1894, under which this bond was given and the material was furnished, is entitled "An Act for the "protection of persons furnishing materials and labor for the "construction of public works," and provides that contractors with the United States for the construction of any public building or work,

> "shall be required, before commencing such work, to exe-
> "cute the usual penal bond, with good and sufficient sure-
> "ties, with the additional obligations that such contractor
> "or contractors shall promptly make payments to all per-

"sons supplying him or them labor and materials in the "prosecution of the work provided for in such contract; "* * * upon which said person or persons supplying "such labor and materials shall have a right of action and "shall be authorized to bring suit in the name of the United "States for his or their use and benefit against said con- "tractor and sureties and to prosecute the same to final "judgment and execution."

Subsequent to the making of the contract with the United States and the giving of the bond and almost a year *after* the furnishing of the material by Struthers Wells Company and *after* the money had become due from the contractor and from the Surety Company, and *after* the rights of Struthers Wells Company had thus become vested, Congress passed an act approved February 23, 1905, the material portions of which read as follows:

"That hereafter any person or persons entering into a "formal contract with the United States for the construc- "tion of any public building, or the prosecution and com- "pletion of any public work, or for repairs upon any public "building, or public work, shall be required, before com- "mencing such work, to execute the usual penal bond, with "good and sufficient sureties, with the additional obligation "that such contractor or contractors shall promptly make "payments to all persons supplying him or them with labor "and materials in the prosecution of the work provided "for in such contract; and any person, company, or corpor- "ation who has furnished labor or materials used in the "construction or repair of any public building or public "work, and payment for which has not been made, shall "have the right to intervene and be made a party to any "action instituted by the United States on the bond of the "contractor, and to have their rights and claims adjudi- "cated in such action and judgment rendered thereon, sub- "ject, however, to the priority of the claim and judgment "of the United States. If the full amount of the liability "of the surety on said bond is sufficient to pay the full "amount of said claims and demands, then, after paying "the full amount due to the United States, the remainder "shall be distributed *pro rata* among said interveners. If no "suit should be brought by the United States within six "months from the completion and final settlement of said "contract, then the person or persons supplying the con- "tractor with labor and materials * * * shall have a

"right of action, and shall be and are hereby authorized to "bring suit in the name of the United States in the Circuit "Court of the United States in the district in which said con- "tract was to be performed and executed, irrespective of the "amount in controversy in such suit, and not elsewhere, "for his or their use and benefit, against said contractor "and his sureties, and to prosecute the same to final judg- "ment and execution: Provided, That where suit is insti- "tuted by any of such creditors on the bond of the con- "tractor it shall not be commenced until after the complete "performance of said contract and final settlement thereof; "and shall be commenced within one year after the per- "formance and final settlement of said contract and not "later."

It is undisputed that the contract with the United States was made, the bond in suit given, the material and labor of Struthers Wells Company supplied and furnished, the certified copies of bond and contract applied for and obtained and the cause of action of defendant-in-error against the surety accrued and became vested under and in pursuance of the Act of August 13, 1894 (see complaint, fols. 3-8 of record). Nevertheless defendant-in-error contends on this appeal that because this action was commenced shortly after the passage of the Act of 1905, that therefore the latter and not the Act of 1894 applies.

The question to be examined therefore is: Does the Act of August 13, 1894, under which this bond was given and under which all of our rights accrued and became vested apply to this case, or is the case to be governed by the Act of February 23, 1905? Put in somewhat different language, the question is, must the Act of February 23, 1905, be given retroactive operation?

POINT I.

The Act of February 23rd, 1905, was not intended by Congress to apply to or have effect upon causes of action which had accrued before its passage. The cause of action of Struthers Wells Company, the materialmen, is therefore exclusively governed by the Act of August 13th, 1894, under which the bond in suit was given and under which all rights against the surety became fully vested long prior to the enactment of the new statute.

(a) *The Act of February 23rd, 1905, is not retroactive.*

It is an elementary principle of statutory construction that a statute shall never be given retrospective effect unless the Legislature in most unambiguous and unmistakable language has directed that such should be its operation. It has long since been laid down as the "first principle in legislation that laws are to operate prospectively" (Jackson v. Van Zandt, 12 Johns, R., 168).

The courts in construing statutes have strained the meaning of words, which seemed to require retrospective construction, in order to give such statutes only prospective effect; they have sought refuge behind most unusual constructions and have frequently refused to apply well-established principles of statutory construction when to do so would have resulted in giving a statute retrospective effect. So abhorrent to all ideas of justice have the courts considered retroactive legislation that they have laid down the rule that a proper judicial respect for the lawgivers, demand a presumption that statutes were not intended by the legislature to operate retroactively. Thus, Chancellor Kent says in Dash v. Van Kleeck, 7 John R., 499, that the Courts "are to presume *out of respect to the law-giver* that a "statute was not meant to act retrospectively," and that, therefore, "a statute ought never to receive such a construction if it is susceptible of any other." The strongest possible language is used in the decisions and text books to the effect that every presumption is to be taken against retroactive operation.

Sutherland, Statutory Construction, pp. 1158-1161.
Wade, Retroactive Law, Sec. 34, citing many cases.

The Supreme Court of the United States has again and again expressed itself unmistakably in reference to this principle, and

this entirely aside from constitutional limitations. Thus in Southwestern Coal Co. v. McBride, 185 U. S., 503, in which a Statute of Congress was under consideration, the following language was used:

> "The function of the Legislature is to prescribe rules to "operate upon the actions and rights of citizens in the "future. While in the absence of a constitutional inhibition "the Legislature may give to some of its acts a retrospec- "tive operation the intention to do so must be clearly ex- "pressed or necessarily implied from what is expressed and "assuming the Legislature to possess the power, *its acts "will not be construed to impair or destroy a vested right "under a valid contract unless it is so framed as to preclude "any other interpretation.*"

In

> The United States v. American Sugar Co., 202 U. S., 563, 577 (1906),

Mr. Justice McKenna says:

> "And in reply we are to remember there is a presumption against retrospective operation, and we have said that words in a statute ought not to have such operation 'unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislator cannot be otherwise satisfied.'"

And in the case of the United States v. Heth, 3 Cranch, 413, frequently cited in subsequent decisions of the Supreme Court, the following language is used:

> "Words in a statute ought not to have a retrospective "operation, unless they are so clear, strong and imperative "that no other meaning can be annexed to them or unless "the intention of the Legislature cannot be otherwise sat- "isfied. *This rule ought especially to be adhered to when "such a construction will alter the pre-existing situation of "parties or will affect or interfere with their antecedent "rights, services and remuneration; which is so obviously "improper, that nothing ought to uphold and vindicate the "interpretation, but the unequivocal and inflexible import "of the terms and the manifest intention of the Legislature.*"

Where is there anything in the statute under consideration showing an intention on the part of Congress that the act was

to have any application to bonds given prior to its enactment or to causes of action which had accrued before? On the contrary, the act itself is eloquent with an opposite intention. It is expressed in the future tense throughout. Its language provides that "*hereafter* any person, &c., *shall* be required" to give a bond and "*shall* have the right to intervene," etc. The intention of Congress clearly was that the act should apply to future contracts and bonds only.

The general intention of Congress that Statutes are not to be given retrospective operation so as to deprive a party of his existing rights, is shown by Section 13 of the U. S. Revised Statutes, Act of February 25th, 1871. There is nothing in the the Statute of 1905 specifically repealing the old but even if that were the case Section 13 provides:

> "The repeal of any Statute shall not have the effect to "release or extinguish any penalty, forfeiture, or *liability* "incurred under such statute, unless the repealing act shall "so expressly provide and such statute shall be treated as "still remaining in force for the purpose of sustaining any "proper action or prosecution for the enforcement of such "penalty, forfeiture or liability."

(b) *The argument of this same plaintiff in-error in its brief in the case of U. S. Fidelity & Guaranty Co. v. United States (Kenyon).*

In the case referred to (reported in 204 U. S.), the question was as to the jurisdiction of the United States Circuit Court of causes arising under the Statute of 1904 where the amount was less than $2,000. The action had been commenced prior to the passage of the new statute and the question raised in the case at bar was not therefore involved in that case and the opinion in that case did not pass upon it. However, in his brief, counsel for the plaintiff-in-error in that case presented some strong reasons why the new statute should not be given retrospective effect so as to apply to any contracts or bonds given prior to its enactment and came to the conclusion that the new act was intended "to apply only to bonds given after the act went into effect," that "a new system of procedure upon bonds of this class is enacted and the rights of parties under such bonds are materially changed from the original act;" that "the changes relate not only to procedure but to matters of substantial right" and that "the amended act must be held subject to the general rule laid down by this Court in construing a statute as to its retrospective or prospective effect." (See brief

of plaintiff-in-error in the case of U. S. Fidelity & Guaranty Co. v. U. S., p. 48.)

The exigencies of an appeal to a higher tribunal are sometimes most distressing. We reprint, for the sake of comparison the argument contained in the brief of counsel for this same plaintiff-in-error in the case above mentioned and filed in this Court (see Point II of our Brief, *infra*). That clear and forceful argument is a complete answer to its position taken in the case at bar.

(c). *As to the contention of the plaintiff-in-error that the new Act affects procedure and is therefore to be given retroactive effect.*

Counsel for the plaintiff-in-error seems to be under the impression that because the new statute has some provisions regulating practice and the remedy that therefore as a matter of course these provisions must apply to causes of action which have accrued prior to the passage of the new act. It is true that the general principles above considered have not always been applied with the same strictness to statutes relating to procedure and practice, but even in respect to such statutes the *intention* of the Legislature is just as important and binding upon the courts as in reference to any others. In speaking of such statutes Wade on Retroactive Law, Secs. 38, 39, says:

> "There seems to be no good reason why the wholesome "doctrine that gives a prospective interpretation to statutes "should be confused or weakened by any such exceptions "as those mentioned in the foregoing section (relating to "statutes of procedure and remedy). * * * The rea- "sons for the rule of prospective construction apply equally "to all statutes. By construing a statute it is the aim of "the court to arrive at the real intention of the Legislature. "It is more reasonable to suppose that the intention was to "legislate for the future rather than for the past—to pass "laws of which the whole world might have notice in time "to avoid their penalties rather than to set up a rule of "right for a time which was passed. * * * The doc- "trine that legislative acts, whether remedial or otherwise, "are to be intended as prospective except where a contrary "intent is clearly expressed is abundantly supported by "authorities."

See also to the same effect:

> Pierce v. Cabot, 159 Mass., 202.
> Shallow v. Salem, 136 Mass., 136.

Eddy v. Morgan, 216 Ill., 437.
Auditor Gen. v. Chandler, 108 Mich., 569.
Bedier v. Fuller, 116 Mich., 126.

In the above cited case of Shallow v. Salem the Court says (p. 138):

> "That certain statutes retrospective in their operation may be passed, when of a remedial character, is not controverted; but the general rule applicable to all statutes is that they are to have a prospective operation only, unless it is otherwise distinctly expressed in them, or clearly implied from the necessity of thus giving effect to their provisions."

In Eddy v. Morgan (*supra*), the Illinois Court says (p. 178):

> "But the rule of liberal construction is never carried to the extent of giving the act retrospective effect unless there is something in the act itself which indicates the intention to do so; as where the imperfection of the language used and literal construction might defeat the intention expressed."

Where is there anything in the act itself which indicates the intention that the provisions in reference to practice and remedy were intended by Congress to operate retrospectively? Where is there anything in the act "distinctly expressed" or "clearly implied," indicating any such intention?

(d) *Statutes regulating procedure and the remedy are never given retrospective effect if thereby the right itself is affected as well as the remedy.*

Whatever may be the somewhat varying expressions of the courts and text-book writers as to the rule of interpretation of statutes of procedure and practice, there is no dispute on this point: That in no event will a statute relating to procedure and practice be given retrospect effect, if thereby the *right itself* is affected as well as the remedy. The very citations of the plaintiff-in-error's brief are directly in point: In Larkin v. Saffrans, 15 Fed. Rep., 147, the Court held that it had jurisdiction of an action under a statute passed subsequent to the time when it was commenced, though the Court had no jurisdiction at the time of its commencement. In referring to the proper interpretation of acts regulating procedure and practice the Court expressly stated (at p. 153) that the exception to the general rule did not apply where to give a statute retro-

spective effect *"would violate some contract obligation or divest some vested right."* The American Encyclopedia of Law, vol. 26, p. 695, also cited by the plaintiff-in-error, is to the same effect and states that it is only where the change in the statute *"does not affect the right itself"* that retroactive operation may be given to statutes relating to procedure.

(c) *To give the new statute retrospective effect would affect the right of defendant-in-error.*

It seems to be the claim of the plaintiff-in-error that to give the new Act of Congress retroactive operation would merely mean the application of a different form of procedure and would not affect the pre-existing situation of the parties or impair or destroy any vested right. A comparison of the two statutes will show that this is not the case:

Under the Act of 1894 any person supplying labor and materials in the prosecution of public work is given an unconditional right of action against the contractor and against the surety immediately upon the performance of such labor or furnishing of material. Under the new statute a materialman has no such unconditional right of action. He can sue only if the United States shall not within six months from the "complete performance and final settlement" of the contract bring suit in its own name. The materialmen's action cannot be commenced until after the complete performance of the contract with the United States and the final settlement thereof, and such action must be commenced within one year thereafter and not later. It is clear therefore that while under the old act a materialman was entitled to commence an action at any time after he had furnished the material, under the new statute he has no right of action whatever if the United States sues and if the United States does not sue the materialman can only do so after "the complete performance and final settlement" of the contract with the United States; so that under the new statute the right of a materialman to bring suit is taken away in every case in which the United States brings an action and is also taken in every case where the contract with the United States has not been completely performed or finally settled. It is also to be noted that the new statute in any event operates to postpone the payment of the materialman until the completion and settlement of the contract and for the six months thereafter during which the United States may bring suit.

A further vital and important difference between the old statute and the new is the following: Under the former the

United States had no priority over other creditors, but shared with them equally the proceeds of the bond (United States v. Heaten, 128 Fed. Rep., 414). Under the new statute Congress has been most particular to secure priority to the United States, such priority being expressly provided for in the statute—in fact, being mentioned three times therein. It is, of course, apparent that in this respect alone, if in no other, our cause of action as it existed under the old statute would, if the new statute were applied, be materially affected by reducing the amount of recovery in every case in which the aggregate claims of the creditors exceeded the amount of the balance due on the bond after the prior lien of the United States had been satisfied, as provided in the statute. *If the claim of the United States exceeds or equals the amount of the bond then our claim against the surety would be reduced to nothing.*

In this connection, we would say a word as to the statement made by plaintiff-in-error under Point III of its brief to the effect that the statute of 1894 confers upon the materialmen only a right to a pro rata share in the amount of the bond after the contract has been completed. There is no support for that statement. A reading of the statute shows that an immediate right of action is given. It is intimated by plaintiff-in-error that the case of the American Surety Company v. Lawrenceville Cement Co., 96 Fed., 24, holds otherwise. This case merely holds that where there are a large number of suits against the surety in many jurisdictions and many outstanding claims largely exceeding the penalty of the bond, the surety may bring an action in equity in order that the fund in its hands may be equitably distributed. The proceeding was practically an insolvency proceeding, and the court in that case distinctly relies upon the principle of marshalling the assets. There are no such exceptional facts in the case at bar, for all that appears Struthers Wells Company are the only creditor. No such proceeding has ever been brought by this plaintiff-in-error. Of course, the fact that a court may, when such facts are shown to exist, restrain the pending suits and the bringing of new suits, and may take charge of and equitably distribute the fund, does not for a moment show that the statute of 1894 did not give the materialmen an immediate and absolute right of action against the surety. A court of bankruptcy or a court of equity may restrain creditors and take charge of insolvent estates and distribute the assets pro rata, but the existence of that power does not make a party's right of action any the less immediate and absolute.

How can it be seriously contended in the light of these vital differences between the old statute and the new that the new statute makes a change in practice and procedure only and that its application to the case at bar would not affect the cause of action or vested rights of Struthers Wells Company? In reliance upon the Act of Congress then existing and upon the bond given in pursuance thereof the Company furnished material for which it was entitled to payment *forthwith* from the contractor and the surety. It had an unconditional cause of action,—a vested right which under well-established authority is property like any other chattel. That vested right continued until February 23rd, 1905. On that day, according to the argument of plaintiff-in-error, that right of action was practically taken away. It is not pretended that this was accomplished by any process of law due or undue. It was done, if at all, by the arbitrary act of Congress of the United States, without notice, trial or hearing. This right, it would seem, then became suspended and remained suspended for such indefinite period as might elapse until the complete performance of the contract and final settlement thereof, and for six months thereafter. No action can be brought against the surety or against the contractors under this new statute until such time has elapsed, and if the contract is never completely performed or finally settled no action could ever be brought by the materialman. In addition, since under the new statute priority is expressly given to the United States, the materialman would lose his cause of action when the amount of the claim of the United States exceeds the amount of the bond. If, therefore, in the case at bar the claim of the United States eats up the face of the bond then our right against the surety is absolutely taken away.

In this connection it is not to be forgotten, that the law as it was at the time that the contract was entered into, is as much a part of such contract as if it had been incorporated therein by express terms. It is to be noted that the bond in question is drawn according to and follows the words of the act of 1894, and that the complaint states that it was given pursuant to said statute. Even if this were not the case, the Statute in force when the bond was given must be read into and be deemed part of it, as has been frequently held:

Von Hoffman v. Quincy, 4 Wall, 548.
Edwards v. Kearzey, 96 U. S., 595.
Siebert v. Lewis, 122 U. S., 284.

"It is also settled that the laws which subsist at the time

"and place of the making of a contract and where it is to "be performed, enter into and form a part of it as if they "were expressly referred to or incorporated in its terms. "This principle embraces alike those which affect its va- "lidity, construction, discharge and enforcement. * * * "If these acts so change the nature and extent of existing "remedies as materially to impair the rights and interests "of the owner, they are just as much a violation of the "compact as if they overturned his rights and interests."

Von Hoffman v. Quincy (*supra*).

From the foregoing, it is perfectly clear that to give the new statute retroactive operation, would interfere with the vested rights of the defendant-in-error, would impair the obligation of its contract and would deprive it of property without due process of law. We are aware that it is technically within the power of Congress to pass a law impairing the obligation of a contract, the constitutional limitation being only upon the States; but as Chief Justice Cooley forcibly puts it in his Principles of Constitutional Law (page 314): "That Congress should "not have been prohibited from impairing the obligation of con- "tracts as the States were, may well excite some surprise. It "was certainly never intended that Congress under any circum- "stances should exercise that tyrannical power and it probably "never occurred to any one as possible that it would ever at- "tempt to do so. Should it, however, attempt it in the case of "private contracts, the act may well be held not to be legitimate "legislation and therefore incompetent and void."

However, any act of Congress which would have the effect of taking away a cause of action or even of suspending its enforcement and thus extending the time of payment not only violates the fifth amendment of the Constitution, but is beyond the power of the legislature of a government like ours.

"A law that destroys or impairs the lawful private con- "tracts of citizens * * * or a law that takes property "from A and gives it to B, it is against all reason and jus- "tice for a people to entrust a legislature with such powers "and therefore it cannot be presumed that they have done "it."

Calder v. Bull, 3 Dall, 383.

Any postponement of payment or suspending the enforcement of the contract would take away property-vested rights—without due process of law. The legislature cannot suspend a pre-

existing cause of action for six months or until a certain contract is completely performed or finally settled (which eve may never happen), for it would thereby be depriving its owner of property without due process of law:

> "If legislation tends to postpone or retard the enforce-
> "ment of the contract, the obligation of the latter is to that
> "extent weakened. The Latin proverb *qui cito dat bis dat*
> "(he who gives quickly gives twice) has its counterpart in
> "a maximum equally sound, *qui serius solvit minis solvit*
> "(he who pays too late pays less). Any authorization of
> "the postponement of payment or of means by which such
> "postponement may be effected is in conflict with the con-
> "stitutional inhibition."
>
> Louisiana v. New Orleans, 102 U. S., 206.
> Sutherland Statutory Construction, vol. 2, p. 1201.

It is not necessary for us to pursue the subject further. It is clear that to give this statute retroactive operation would interfere with and violate vested rights, would impair the obligation of the contract and would take property without due process of law, *and all this without even the slightest intimation in the statute itself or elsewhere that Congress ever intended any such result.* In the reported cases, where it has been attempted to give statutes retroactive effect, there are always in the statutes under consideration some words or phrases or surrounding circumstances showing an apparent intent on the part of the legislature to give it such effect, but here there is nothing of the kind; on the contrary, by the terms of the statute itself it is expressly made to refer to the future only.

(f) *As to the novel scheme proposed by plaintiff-in-error to divide and separate portions of the statute so as to make the statute partly retrospective and partly prospective.*

The learned counsel for the plaintiff-in-error has constructed a theory all his own as to the real intention of Congress regarding the application of the new statute. He says that the construction of these provisions dealing with substantive rights, and not with procedure will be such as to apply to bonds executed subsequent to the enactment of the statute and to such bonds only (page 9 of his brief). The provisions dealing with procedure, however, will be held to apply to bonds executed prior to the enactment of the statute and to causes of action existing at that time (page 9). He further states on the same page that there is no difficulty in so construing the law. We

must confess that such a *division* of the statute is most extraordinary and unusual, to say the least. This is entirely aside from the fact that there is not a word in this new statute authorizing or warranting anything of the kind. Surely the Court cannot by such judicial legislation make the new statute retrospective in some respects and prospective in other respects, when there is not a word in the statute warranting any such interpretation or showing that such was the intention of Congress, and when on the contrary the opening words above quoted have about as strongly prospective an effect as any words in the English language could possibly have.

Our opponent's brief admits that so far as the priority of the United States is concerned the new statute can have no application to causes of action arising prior to its enactment. He passes lightly over this feature of the case by stating that the full amount due the United States depends upon whether the bond was executed prior or subsequent to the enactment of the statute (page 10 of his brief). As to all other features of the new statute it would seem to be his contention that the new statute and not the old applied. There is neither reason given nor authority cited for his *ipse dixit*. Furthermore, if the old statute is to apply to our cause of action, so far as the priority of the United States is concerned, then there is no reason that we can see why other changes which the new statute creates in the substantive rights of the materialman should not be similarly treated. The materialman's right to sue is suspended under the new statute until after the completion of the work and final settlement thereof, and for six months thereafter no suit can be brought. This would be, as already pointed out, a very material change; it is the taking away of a substantive right, and not merely a matter of procedure. Counsel for plaintiff-in-error admits in his brief that a cause of action existing before the passage of the new act is exempt from the provision of the new statute giving priority to the United States, why then should not the same exemption be accorded to such pre-existing cause of action from the provision suspending the cause of action and postponing payment indefinitely? In other words, why should the provision of the new statute in reference to the suspension of the cause of action until the final completion and full settlement of the contract with the United States and for six months thereafter, which may mean an absolute destruction of the cause of action, be given retrospective force when the provision in reference to the priority of the United States has admittedly no effect upon any pre-existing cause of action?

The suggestion of counsel as to this division of the various parts of the new statute and their application to pre-existing rights cannot be taken seriously for the reasons above stated. We do not see how it can be disputed that the changes in the new statute above referred to are matters of substantive rights and not mere matters of procedure or practice. Upon well establishd authorities therefore the new statute cannot affect our rights in the slightest. We made our agreement for the delivery of the material when the old law was in force, when we had certain vested rights. Of these vested rights we would be deprived if the new law, passed subsequent to the accrual and vesting of our rights, was applied to us. We can see no reason why this should be done when neither the terms of the statute nor any principle of law requires it. It is quite unlikely that the materialmen would have accepted the order for the delivery of the material if they had known that their protection under the bond—that is, their cause of action against the Surety Company—was to be changed or suspended for any period of time or in any way limited or the amount of the recovery reduced. To enforce the new statute as to a pre-existing cause of action would be making a new contract between the parties which, under well-settled principles, the courts will not do.

POINT II.

The following is a reprint of the argument of this plaintiff-in-error in its brief in this court in the case of the United States Fidelity & Guaranty Co. v. United States (Kenyon) on the question whether the statute of February 25th, 1905, was intended to be retroactive:

THE AMENDED ACT IS NOT RETROACTIVE.

It suffices to say, under the rule of construction of statutes adopted by this court, that in the absence of any language in the amended act showing an intention on the part of Congress to have its provisions retroactive, its provisions should be construed prospectively only.

Murray v. Gibson, 15 How., 421 (1853).
McEwen v. Den, 24 How., 242 (1860).
Harvey v. Tyler, 2 Wall., 328, 347 (1864).
Twenty Per Cent. Cases, 20 Wall., 179, 187 (1873).

Chew Heong v. United States, 112 U. S., 536, 559 (1884).
Shreveport v. Cole, 129 U. S., 36, 43 (1888).
Southwestern Coal Co. v. McBride, 185 U. S., 499, 503 (1901).

(Here the brief quotes from and cites numerous cases, most of which have already been referred to by us, Point I of our brief.)

Applying the principles set forth in the foregoing authorities to a construction of the amended act, it becomes apparent that it is not susceptible of a retroactive construction so as to apply to cases already pending under the original act.

The changes made by the amended act are radical and sweeping. The amended act was designed to meet the many defects that had been pointed out in the original act by the judicial decisions thereon. These amendments apply to both procedure and substance. The more important of these amendments are as follows:

1. The United States shall first bring suit upon the bond and claimants shall have the right to intervene in such action.

2. Claims due to the United States shall have priority.

3. If the United States does not bring suit within six months from the completion and final settlement of the contract, then the claimant can procure a copy of the bond and sue thereon.

4. The claimant shall have a right of action and shall be authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, and not elsewhere *irrespective of the amount in controversy in such suit.* * * * (Italics ours.)

5. Actions on such bonds by claimants must be commenced within one year after the performance and final settlement of the contract.

6. Provision is made for only one action and for intervention in such action by other claimants; and also for payment into court by the surety of the maximum amount of its liability and from relief thereupon from further liability.

The amended act provides for an entirely new system of procedure which could not have been intended to apply to causes of action already pending, and in the clause providing for

notice, it expressly states that "in all suits instituted under the provisions of this act, &c.," showing that it was intended to act prospectively only. It also provides that only one suit shall be brought on any one bond. Thirteen other cases are pending in the Circuit Court for the District of Rhode Island, awaiting the decision of this court in the case at bar. Would it be said that so far as these cases grow out of the same contract, there would be need of consolidation so as to make them conform to the requirements of the amended act?

Such a construction of the law would result in a condition of "confusion worse confounded" and it is impossible to contemplate that Congress ever intended it. It also introduces a new feature, viz., priority of any claim due to the United States over the claims of other claimants. The effect of giving a retrospective construction to the amended act might very well be in certain cases to deprive claimants of the vested right to share equally with the United States in the marshalling of assets. See in this connection

United States v. Bryan, 9 Cranch, 374,

where a statute giving the United States priority over other claimants was held not to apply to an indebtedness accruing to the United States before the passage of the act.

The amended act is expressed in the future tense. The language is that "hereafter any person, &c.," "shall have the right to intervene." "If no suit should be brought by the United States * * * then the person supplying, &c., shall, &c." This form of expression, as was said by Mr. Justice McKenna, in

United States v. American Sugar Co., 202 U. S., 563, 578,

"must be given weight."

The provision giving jurisdiction to the Circuit Court, irrespective of the amount involved, is a part of the general scheme of the act, and clearly applies to bonds given after the approval of the act. It is impracticable, if not impossible, to separate it from the other provisions of the act and to hold that as affecting procedure it applies to pending suits.

* * * * * * * *

In conclusion, we contend that the amended act is intended to apply only to bonds given after it went into effect. This conclusion is based upon the language of the act. A new system

of procedure upon bonds of this class is enacted and the rights of partis under such bonds are materially changed from the original act. The United States is made a preferred claimant as to any claims it may have. The changes, therefore, relate not only to procedure but to matters of substantive right. It is impossible to separate the two and whatever the rule may be as to remedial statutes, the amended act must be held subject to the general rule laid down by this court in construing a statute as to its retrospective or prospective effect. Upon all the considerations, and in view of the language of the act, the amended act is neither retrospective nor declaratory; it applies only to future cases, and the case at bar having arisen and been begun under the original act, the amended act does not in any way affect the decision of this court therein.

(See our reference to the foregoing reprint under Point I, Subdivision b, of this brief, supra.)

POINT III.

Even if the statute were retroactive, as the plaintiff-in-error claims, the demurrer to the complaint does not bring up the two questions as to procedure raised by the plaintiff-in-error in its brief.

The plaintiff-in-error claims that there are two matters of procedure under the Act of 1905 raised by its demurrer: (a) That the complaint is defective in that it does not state that six months have expired since the completion of the work (see point V of its brief). (b) That the Circuit Court had no jurisdiction because the action was not brought in Baltimore, which was the proper district under the Act of 1905.

Of course, our argument under the previous points of this brief, that Congress did not intend that the new Statute should have retroactive operation, answers these points, but there are further answers as follows:

(a) *As to the point that the complaint does not state that six months have expired since the completion of the work.*

(See Point V, page 19, of the brief of the plaintiff-in-error).

The plaintiff-in-error contends in effect that the expiration of six months after the completion of the work should have been alleged in the complaint as a condition precedent. There is nothing in the Statute requiring such allegation. The Statute of 1905 provides that "if no suit should be brought by the United States within six months from the completion and final settlement of said contract then the person or persons supplying the contractor, etc., shall have a right of action and shall be and are hereby authorized to bring suit," etc. *Non constat* but that in the case at bar the six months have expired since the completion of the work without a suit having been brought by the United States. If six months have not expired it would be a matter of affirmative defense and the question can not be raised by demurrer. It is no part of the cause of action, it is a limitation and under the New York practice must be affirmatively pleaded.

Zebley v. Fd. & T. Co., 139 N. Y. Reports at page 468.

Again, it seems quite absurd to claim, as plaintiff-in-error does, that we should have waited six months before bringing suit as provided by the Act of 1905 and in the same breath to admit as the plaintiff-in-error is obliged to do, that the United States cannot have any priority in this case, the bond in suit having been given under the Act of 1894 under which the United States has no priority. Of course, the sole purpose of the provision of the Act of 1905 giving the United States the first right to bring suit, i sto determine the amount of its priority. Now, it is admitted by the plaintiff-in-error that in the case at bar the United States cannot have any priority (page 10 of its brief). Then why should we wait six months before bringing suit? In order to enable the United States to get a priority which the law does not give it?

This only serves to illustrate the absurdity of the novel scheme of the plaintiff-in-error to make the Statute partly retrospective and partly prospective.

(b) *As to the claim that the Circuit Court had no jurisdiction over the subject matter of this action because the action was not brought in the proper district.*

(Answering Point II, page 12-14 of the brief of the plaintiff-in-error.)

The action was brought in the proper District under the Statute of 1894 but the plaintiff-in-error claims that it was not brought in the proper district under the new Statute.

A complete answer to its contention is that the question of jurisdiction has not been properly raised.

The demurrer filed by the plaintiff-in-error sets forth three grounds: (1) That the Court had no jurisdiction of the person of the defendant. (2). That the Court had no jurisdiction of the subject of the action. (3). That the complaint does not state facts sufficient to constitute a cause of action (p. 5 of record).

The service of this demurrer was a general appearance by the plaintiff-in-error in this action.

St. Louis R. R. Co. v. McBride, 141 U. S., 127.
New York Code of Civil Procedure, Sec. 421.

In the case just cited, the grounds of demurrer were identical with those in the case at bar. It was there contended by the plaintiff-in-error that the action should have been brought in the district in which defendant was an inhabitant. This Court held, that as there was a general appearance to the merits, and as the lower Court could therefore take jurisdiction of the case, such appearance waived not only defects in the service but "all special privileges of the defendant in respect to the particular locality in which the action was brought."

The Court says, page 132:

> "Without multiplying authorities on this question, it is obvious that a party who, in the first instance, appears and pleads to the merits, waives any right to challenge thereafter the jurisdiction of the Court on the ground that the suit has been brought in the wrong district."

See also to the same effect

Texas & Pacific R. R. v. Saunders, 151 U. S., 15.

In the case at bar, the Court had general jurisdiction under either statute, and the filing of a demurrer was not the proper method of raising a question as to special jurisdiction in reference to the proper district.

It will be noted that there is in the record no certificate of the Circuit Court of Appeals certifying any question to this Court.

POINT IV.

The judgment of the Circuit Court of Appeals of the United States should be affirmed.

Respectfully submitted,

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